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Rule of Law and European Values: Beyond the state-of-the-art analysis

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Prologue: A vision of societal reality for the Rule of Law and European Values

This project is the result of a research journey, consolidating many years of expertise and experience engaging with key socio-legal challenges in Europe, contributing to legal scholarship but also developing innovative solutions with impact beyond academia.

As academics, we are located primarily in a rather difficult area of Europe, on a divided island in a frozen conflict zone, namely Cyprus, at the outskirts of the EU and in a challenging region, but at the same time culturally rich, at the crossroads of several continents and jurisdictions, and in Pyla, the only mixed village of the island. We have drawn much inspiration for our research from this unique setting and have developed as a result a personal mission to serve society through innovative and engaged research of international standards and reach, with a primary focus on key socio-legal challenges in Europe, particularly in turbulent times.

Over the last 10 years, we have been supported in this journey by several Jean Monnet Actions under the Erasmus+ programme. In the last decade, and among others, we have delivered from UCLan Cyprus (i) a Jean Monnet Module (JMM) on the socio-economic implications of the financial crisis FEcoGov (2014-17), securing the European Commission's label 'success story' and 'good practice' upon completion of the project,[1] (ii) a JMM on the Rule of Law and Populism in Europe EU-POP (2019-22) which we are now completing with much nostalgy,[2] (iii) and since February 2022, a Jean Monnet Centre of Excellence (JMCE) (2022-25) that will establish the Centre for the Rule of Law and European Values (CRoLEV) and will propose ways to further secure European values and rule of law protections in Cyprus and beyond. The project has a designated sustainable and inclusive strategy expanding beyond EU frontiers and concepts.

Any meaningful journey must have a vision. Ours is societal. CRoLEV's overarching desire is to participate to the societal enhancement of justice in Europe and beyond, to contribute to overall social harmony, by eventually deploying some aspects of the societal reality of the rule of law and European values with international reach. Through the study of the impact of the rule of law and European values on the enhancement of societal balances locally, with repercussions across Europe and beyond, we wish to reflect on societal reality and eventually contribute to sustainable justice beyond EU frontiers and concepts. Many States in Europe but also worldwide have been heavily affected by emergency situations such as economic

[1] https://www.uclancyprus.ac.cy/research/jean-monnet-module/
[2] https://eupopulism.eu/

crises and war, migration and refugee crises, and by the fallout of the Covid-19 pandemic, facing as a result renewed global phenomenon of social inequality, polarisation, misinformation, digital and societal transformations, all having a direct impact on social harmony across jurisdictions. Yet, social harmony is not often directly associated with rule of law indicators but rather with the Sustainable Development Goals (SDGs). Ultimately, there is a need to advance the societal meaning of the rule of law and European values, of direct interest to any human being, generations to come, and societies, shifting focus from rule of law and values conditionality to rule of law and values sustainability.

Prerequisite to this vision, if and when materialised, is the impactful research which CRoLEV will undertake over the next couple of years to address more immediate rule of law and values needs in a European context. The present Deliverable constitutes the project's road map in the form of a beyond-the-state-of-the-art analysis.

By Prof. Stéphanie Laulhé Shaelou, Professor of European Law and Reform, Head of School of Law, UCLan Cyprus and Director, CRoLEV

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1 Introduction

Article 2 of the Treaty on European Union (TEU) lists a series of values, often dubbed 'European values' that are at the heart of the EU's constitutional framework. It includes, inter alia "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". Among the objectives of the Union is to promote these founding values to the outside world while at the same time securing their protection within and alongside the Member States. Under the principle of loyalty, the Member States are in fact obliged to "facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".[3] However, the Union seems to be persistently in a 'state of crisis', which has only worsened these attempts, not only in promoting these values externally but also in protecting and maintaining them internally within the Union's borders.

From the financial to the refugee crisis, to the ongoing Covid-19 pandemic and war in Ukraine, the Union and each Member State have faced several emergency situations and have been forced to take immediate action. Yet responding to those threats has not been a straightforward endeavour. In fact, it is often argued that those crises have in turn planted the seeds of further threats. The rule of law, democracy, and fundamental rights, jointly some of the fundamental values upon which the Union is built, are currently under threat, primarily in Central and Eastern Europe but also across the EU and in neighbouring countries. From threats to the independence of the judiciary, to muzzle laws seeking to silence and discipline members of the judiciary critical of governments, and from the erosion of the separation of powers to limiting free speech, core elements of liberal democracies are jeopardised. The emergence of right-wing populist parties around the EU and their establishment as main political actors in countries such as Poland and Hungary constitute novel threats for the Union's internal cohesion and values.

The current pandemic has brought to the forefront and only exacerbated concerns about the state of the rule of law, its compatibility with emergency measures, and the deterioration of European values and principles, such as equality, democracy, individual rights, and active

[3] On the 'state of crisis' in the EU see previous and current research projects at UCLan Cyprus including co-funded by the European Union: Jean Monnet Module "The Law of Financial and Economic Governance in the EU" (FEcoGov) (2014-17) Erasmus+ 2014-2020 Programme <https://www.uclancyprus.ac.cy/research/jean-monnet-module/>; The Rule of Law Monitoring Mechanism (RoLMM), an inter-disciplinary initiative of the School of Law of the Cyprus Campus of the University of Central Lancashire (UCLan Cyprus) <https://ruleoflawmonitoringmechanism.eu/>.

citizenship. In particular, we have witnessed governments being eager to restrict individual freedoms in the name of public health, only to tread a thin line between proportionality and the protection of the public interest on the one hand, and arbitrariness and illegality on the other.

The rule of law and democracy backsliding within and outside the EU makes it imperative to analyse the various ways in which the rule of law and other European values are under attack within Member States, how such attacks have intensified in times of crisis, and what the EU has done, and can do, to secure its values. It thus appears that a pressing need exists for further research and analysis of the state of the rule of law and values across the EU, taking into account new developments, renewed challenges from different perspectives, that arose both nationally and supranationally.

CRoLEV is a new Jean Monnet Centre of Excellence funded by the European Union under the Erasmus+ programme 2021-27. CRoLEV intends to (i) explore the state of the rule of law within the EU and in neighbouring countries, using empirical research; (ii) investigate the deterioration of the rule of law and EU values in times of crisis; (iii) evaluate the mechanisms available at the EU level to secure European values and rule of law protections; and (iv) deliver research-informed teaching designed to reach academics, students, and professionals, but also young people and the civil society in Cyprus and across Europe. CRoLEV intends to raise awareness about the fragility of the rule of law and values in times of crisis, thus inspiring action to safeguard them in a sustainable environment.

The Centre seeks to address the challenges discussed above by, among other things, measuring the effectiveness of rule of law and value protections, and investigating the compatibility between government emergency responses and such protections. Given how these challenges are common in many European and non-European countries, CRoLEV will produce outcomes that will be of significance for multiple international actors, contributing to filling in the gap in the protections of the Rule of Law and European Values and multiplying the impact of its work. In general, the project will correlate the endangered protections of citizens throughout Europe in times of public threats, with the fact that the same measures taken to address such emergency situations can have adverse effects on the rule of law, democratic principles, and fundamental rights. The assessment of that correlation will require an interdisciplinary analysis incorporating socio-legal, economic, philosophical, historical, geographical, and political perspectives.

The current report, entitled 'Beyond the state-of-the-art analysis', addresses Deliverable D.3.1. which intends to set out a clear needs analysis of the research of the project, the quantitative and qualitative methodological approaches, the tools that will be used and to clearly delimit the aims and objectives of both the normative and empirical research. At the end of the research the results will be visualised in an interactive dashboard that will be created and maintain after the project via sustainable means. The dashboard, besides the measurements of the single indicators relevant to the rule of law, will also clearly demonstrate the gaps in Cyprus as well as the areas of possible transferrable development and improvement. Beyond the research objectives the project will also organise a series of activities, such as public lectures and intensive courses by world-leading experts on the rule of law.

The Report starts by setting out a clear needs analysis of the project emphasising on the rule of law backsliding in Europe and the rise of populism, the effects of the pandemic on the rule of law, the responses of EU institutions in securing the rule of law as well as the state of the rule of law in Cyprus (Section 2). The Report then moves on to the conceptualisation of the rule of law, which also constitutes part of the methodological approach that is adopted for the empirical aspect of the research (Section 3). Section 4 then moves on to the empirical part of the research which focuses on the measuring of aspects of the rule of law. In particular, this section discusses the rationale behind measuring the rule of law, provides a detailed literature review on the existing indices measuring the rule of law and sets out step-by-step the methodological approach that will be adopted to develop and measure indicators on aspects of the rule of law. These steps include the conceptualisation of the rule of law, the data selection process, the data analysis and visualisation of results as well as the good practices to ensure transparent and unbiased results.

2 CRoLEV Needs Analysis

This Section outlines the state of the rule of law and related European values in the EU today. By examining various threats to European values today, this section intends to identify areas that warrant further research. Our aim here is to identify specific dangers to European values both at the European level and in Cyprus. In the first section, we evaluate the rise of populism and the way that has affected the rule of law and other European values such as democracy, respect for fundamental rights, individual freedom, and equality. Next, we turn to the mechanisms already existing at the EU level meant to monitor and protect the rule of law and other Article 2 values, noting how they have been inadequate in preventing rule of law and democracy backsliding in various EU countries. Section 3 traces threats to European values associated with the COVID-19 pandemic emphasising the need for continued research in this area. CRoLEV intends to fill that gap by looking in more detail at the long-term effects of pandemic responses on European values. Last, section 4 turns to Cyprus and identifies some key difficulties regarding the rule of law. We note a significant need for extensive research on the state of the rule of law on the island, both empirical and normative—a task that CRoLEV will seek to carry out.

2.1 Rule of Law Backsliding in Europe and the rise of populism

'Populism' has become a 'buzzword' across the globe over the last decade. From populist leaders within the EU such as Victor Orban, to Donald Trump's meteoric rise to the office of the president of the US and to Eurosceptic populists in the UK achieving the country's exit from the EU, populism has become a mainstay of contemporary political discourse. Even though political scientists and theorists insist on the plurality and heterogeneity of various populist movement (left populism, ethnonationalist populism etc.), this section will attempt to explain how the rise of populism within the EU constitutes a serious threat to the rule of law and to other European values.[4]

[4] See e.g., EU-POP JMM, https://eupopulism.eu accessed 24 August 2022

2.1.1 What is populism

There is a vast literature addressing a series of issues related to populism.[5] One particular part of the literature refers to the conceptualization question. Despite an abundance of different approaches, the concept remains elusive. We shall not expand on the theory of populism here, nor offer any insights into the reasons that allow populist movements to flourish.[6] Suffices to note some of characteristics of populism that, even if not universally accepted, remain popular and can account for the type of populism that has taken hold over multiple European countries since the late 2000s.

For Mudde, populism amounts to a 'thin-centred ideology'.[7] This description helps explain the varying manifestations of populism. If populism is not a substantive ideology, it means that it can manifest attaching to some other ideology.[8] When it attaches to nativism, for example, the result is ethnonationalist populism. Following Mudde's rather neutral approach can help explain a wide-range of phenomena taking place under the banner of populism. If populism is simply a matter of political discourse, then a left-wing party like Podemos in Spain or Syriza in Greece is as populist at the French Front National or the British UKIP.

Having said that, there remain some features that are essential for any type of populism. For Mudde, populism "considers society to be ultimately separated into two homogeneous and antagonistic groups, 'the pure people' versus 'the corrupt elite,' and which argues that politics should be an expression of the volonté générale (general will) of the people." [9] A Manichean distinction obtains between the demos, the part that represents the ordinary

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[5] Cass Mudde and Cristobal Rovira Kaltwasser, *Populism: A very short introduction* (Oxford University Press, 2017); Cass Mudde, *Populist Radical Right Parties in Europe* (Cambridge University Press, 2007); Benjamin Moffitt and Simon Tormey, 'Rethinking populism: Politics, mediatisation and political style' 2014, 62 Political studies 381; Jan-Werner Müller, *What is Populism?* (Penguin Books, 2016); Takis Pappas, *Populism and liberal democracy: A comparative and theoretical analysis* (Oxford University Press, 2019); Ernesto Laclau, 'Populism: what's in a name?' in D. Howarth (ed.), *Ernesto Laclau: Post-Marxism, populism and critique* (Routledge, 2015); Anne Schulz et al. 'Measuring populist attitudes on three dimensions', (2018) 30 International Journal of Public Opinion Research 316; Margaret Canovan, 'Trust the people! Populism and the two faces of democracy', (1999) 47 Political studies 2; Nadia Urbinati 'Political Theory of Populism', (2019) 22 Annual Review of Political Sciences 110

[6] Donald MacRae, 'Populism as an ideology', in Ghita Ionescu and Ernest Gellner (eds.), *Populism, Its Meanings and National Characteristics*, (Macmillan, 1969); Stewart, A 1969, 'The social Roots', in Ghita Ionescu and Ernest Gellner (eds.), *Populism, Its Meanings and National Characteristics*, (Macmillan, 1969)

[7] Mudde, *Populist Radical Right Parties* 23

[8] Ben Stanley, 'The Thin Ideology of Populism', (2008) 13 Journal of Political Ideologies 95, 100

[9] Cas Mudde, 'The Populist Zeitgeist', (2004) 39 Government & Opposition 541, 544; Fransisco Panizza, (ed.) *Populism and the Mirror of Democracy* (Verso, 2005)

people, and the elite, that part of the population that wields political power. Crucially, this distinction is moralised: the people are morally good, incorrupt, noble and those who oppose them, are corrupt, self-interested, and exploitative. For populists, there is a sharp divide in the society between those in support of and representing the people, and those who oppose and threaten it.

What contributes to ambiguity about populism is that defining the people is no easy task.[10] Jan-Werner Müller, even though 'the people' is the central characteristic of populist discourses against which the enemy is construed, it is 'ultimately fictional'.[11] Different ideologies will therefore undertake the task of 'constructing' the people according to their underlying political philosophies.[12] Nativists will portray the people in ethnic terms—as a homogeneous group comprising individuals who share an ethnic identity. Anyone threatening the purity of the people is ipso fact the people's enemy. For socialists, 'the people' comprises the economically disadvantaged—the middle class, the working people, those struggling to make a living. The people's enemies are thus the ultra-rich, the 1% holding the majority of the wealth, those who exploit their positions of power to entrench their economic superiority and maximise their economic resources. The concept of the people is malleable; its enemies are therefore constructed in different ways. The people's enemy is anyone threatening its identity and/or interests. Immigrants crossing into one's country could be a threat to the people. But so can the European Union or other powerful international agents. If anyone can become a threat to the people, then populists can shift their focus to different targets at different times.

In his influential work, Muller identifies three elements that are common to populism: it is monist, moralistic, and anti-pluralist. It is monist because it insists in the singularity of the people's will. Only the will of the people legitimates political power; only the 'true' representatives of the people's will (the volonté générale) should be involved in the decision-making process (the people). It is moralistic because, as we have seen, that group is morally superior from its opponents (the elite). The third (and perhaps most controversial) element is that populism is anti-pluralist because it admits to no competing interest that could endanger the will of the people from becoming realised.[13] Others reject Muller's account

[10] Rogers Brubaker, 'Why Populism?' (2017) 46 Theory and Society, 357, 359
[11] Muller *What is Populism* 20
[12] Benjamin Moffitt, *Populism* (Polity Press, 2020) 13
[13] Muller *What is Populism*, 2-4

suggesting, instead that these elements are characteristic of right-wing populism and not populism in general.[14]

The rise of populists to power is accompanied by a series of actions that are threatening core European values. Commentators have stressed the various ways in which populists in power attack central components of the rule of law and constitutional democracies by undermining judicial independence, fundamental rights, free speech and the media, and dissent.[15] Populism, they argue, leads to dissent into anti-liberalism and authoritarianism. But for Tushnet and Bugaric, this is not the inevitable path of all populist movements. Populism, they suggest may seek to make democracy more inclusive and responsive.[16] As such, many populist movements do not fit the anti-pluralist component Muller sees as necessary for populism. Ultimately, they argue, it is the underlying substantive ideologies that determine how populist will fare towards democracy and constitutionalism.

The discussion that follows offers some general points about the ways in which populism (generally construed) fits or clashes with some key European values, namely the rule of law, democracy, and human rights. We do not, at this stage, consider the specific attacks on these values we have witnessed, and are still witnessing, across the EU. That task will be postponed to Section 3, which will turn to the specific brand of right-wing ethnonationalist populist that has taken hold in Poland and Hungary, looking at their activities that undermine European values.

2.1.2 Populism against democracy, the rule of law, and human rights?

The connection between democracy and populism is easy to grasp. The idea of popular sovereignty, which props up democratic governments, coheres with populist demands that the people's will should be realised. To the extent that populism advocates the realisation of the interests of the people and attempts to give voice to those excluded from political processes,

[14] See e.g., Mark Tushnet and Bojan Bugaric, *Power to the People: Constitutionalism in the Age of Populism,* (OUP, 2022)

[15] See e.g., Mulle *What is Populism*r; Takis Pappas, 'Populists in Power' (2019) 30 Journal of Democracy; William Galston, *Anti-Pluralism: The Populist Threat to Liberal Democracy* (Yale University Press, 2018); Stefan Rummens, 'Populism as a Threat to Liberal Democracy' in Rovira Cristobal Kaltwasser et al. (eds) *The Oxford Handbook of Populism* (OUP. 2017)

[16] P.37. See also Yannis Stavrakakis et al. 'Populism, anti-populism and crisis' (2017) 14 *Contemporary Political Theory*, 4; Camila Vergara, 'Populism as Plebeian Politics: Inequality, Domination and Popular Empowerment' (2020) 28 Journal of Political Philosophy 222; Paul Warren, 'Two Concepts of Populism', in Mark Christopher Navin and Richard Nunan (eds.), *Democracy, Populism and Truth* (Springer, London, 2020); Gilles Ivaldi, Maria Elizabetta Lanzone, Dwayne Woods,'Varieties of Populism across a Left‐Right Spectrum: The Case of the Front National, the Northern League, Podemos and Five Star Movement', (2017) 23 *Swiss Political Science Review* 354

it performs a great service to democracy. Goodwyn, discussing the agrarian populist movement in the US declared that 'populism was democracy's zenith'.[17] At first blush, then, we might think that populism fits seamlessly with democratic values. Upon close inspection, however, the relationship is not as harmonious.

The seamless dovetailing of democracy and populism is predicated on an interpretation of democracy as primarily majoritarian. Populist calls for the realisation of the will of the people, unencumbered and unobstructed by obstacles resembles majoritarianism. But such prioritisation of the popular will is incompatible with institutional limits to popular desires constitutional democracies typically maintain. For Urbinati, populism is 'parasitical' on representative democracy because it is fundamentally at odds with the very structure of liberal constitutional democracies that incorporates various limitations of majoritarianism such as constitutionalism, judicial review, and human rights.[18]

Anti-pluralism is also incompatible with democracy. At its core, democracy requires that varied voices are heard, which inevitably leads to disagreements.[19] Far from a homogeneous people expressing a single will, democracy typically comprises a variety of conflicting voices. To preserve the vision of a homogeneous 'we the people', populism must rule out dissenting voices that threaten that homogeneity. This way, populism becomes not just anti-pluralistic but also undemocratic as the freedom to dissent and contest is a hallmark of democracy. Some might object arguing that the incompatibility between populism and democratic rule described here is predicated on specific perceptions of democracy and/or populism. Advocates of left populism praise populism as the invigoration of democracy.[20] Populist moments see the disempowered people rising up against corrupt elites.[21] In a similar vein, Mansbirdge and Macedo argue that populism does not necessarily portray the people as homogeneous and as such, it is not always exclusive.[22]

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[17] Lawrence Goodwyn, *The Populist Moment: A Short History of the Agrarian Revolt in America* (OUP, 1978) vii

[18] Nadia Urbinati, Democracy Disfigured: Opinion, Truth and the People (Harvard University Press, 2014) 135

[19] See e.g., Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press, 1998)

[20] E.g., Laclau, 'What's in a Name'; Chantal Mouffe, *For a Left Populism* (Verso, 2019)

[21] On populism advocating a more direct role for the people see Anton Pelinka, 'Right-Wing Populism: Concept and Typology' in Ruth Wodak, Majid KhosraviNik, and Brigitte Mral (eds) *Right-Wing Populism in Europe: Politics and Discourse* (London: Bloomsbury Academic, 2013) 3–22

[22] Jane Mansbridge and Stephen Macedo, Populism and Democratic Theory (2019) 15 Annual Review of Law and Social Science, 59, 62. Yet they accept that in the extreme, when the elites are portrayed as absolutely corrupt and their interests illegitimate, they become unworthy of any political respect, a

But even were we to accept claims about the possibility of inclusive populism that is not anti-pluralist and not a threat to democracy, it remains the case that there are concerns about the compatibility of any type of populism with the rule of law and other conventional limits on majoritarianism. In populist discourse, where the people are seen as perpetually committed to a struggle against an exploitative elite, the rule of law might often be presented as an instrument designed to stifle the will of the people. Constitutional limits to what the 'will of the people' demands are portrayed as obstacles imposed by a ruling elite. Such approach to constitutionalism and the rule of law might obtain for different types of populism. Carl Schmidt famously rejects the power of rule-of-law constrains to curtail the will of the people when that is expressed by the populist leader.

As Nicola Lacey notes, there is also a 'straightforward analytic connection' between populism and impatience with the rule of law.[23] The rule of law amounts to a principled limit on majoritarianism. When, then, a charismatic populist leader who claims to express the will of the people,[24] is frustrated by institutional checks that we typically associate with the rule of law, conflict inevitably arises. Principles associated with the rule of law, such as the requirement that all power emanates from law, that discretionary powers are used in accordance with laws, that the exercise of political power is subject to various checks and balances, such as judicial review, will impose limits on the will of the people. Populist actors oppose rule-of-law constraints yet seek to rely on law as a means of enforcing their agenda, in what has been dubbed a kind of 'abusive constitutionalism'[25] or 'autocratic legalism'.[26] In these cases, the law itself is used as a tool to undermine European values by attacking minorities, punishing dissent, and enforcing 'executive power discursively legitimised as the people's will'.[27] But such use of the law is incompatible with anything but the thinnest approach to the rule of law. Commentators also disagree on whether populist constitutionalism amounts to a paradox or a plausible position.[28]

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position that engenders anti-pluralism. But such anti-pluralism is not, they suggest, a core element of populism, ibid 67

[23] Nicola Lacey, 'Populism and the Rule of Law' (2019) 15 Annual Review of Law and Social Science 79, 87

[24] On populism and charismatic leaders see e.g., Carlos de la Torre, *Populist Seduction in Latin America* (Athens, Ohio University Press, 2000).

[25] David Landau 'Abusive constitutionalism' (2013) 47 UC Davis Law Review 189

[26] Kim Lane Scheppele 'Autocratic legalism' (2018) 85 University Chicago Law Review 545

[27] Lacey, Populism and the Rule of Law 88

[28] Tushnet and Bugaric, *Power to the People*; Paul Blokker 'Populism as a Constitutional Project' (2019) 17 International Journal of Constitutional Law 536

Anti-pluralist populism that insists that nothing can curb the will of the 'pure' people constitutes a vital threat to fundamental rights as well.[29] Insisting on the homogeneity of the people, populism opposes threats to such homogeneity. Non-native residents, refugees, immigrants, citizens having different religions and cultures symbolise a threat to the purity of the people. As such, they are, as we shall see in the next sections, targets of sustained attacks. But even for Mansbridge and Macedo, which reject the suggestion that anti-pluralism is a core element of populism, the frequent demand that the people and their will should prevail entails a danger for minority rights and other constitutional constraints.[30] In such cases, a populist leader might, for the sake of the people, bypass ordinary procedures and constitutional limits (such as the requirement for the respect of human rights) and act in ways that threaten minority groups.

If populism does not require homogeneity and is not anti-pluralism, then claims that it constitutes a threat to fundamental rights of minority groups (that would otherwise threaten the people's homogeneity) are less persuasive. It appears, then, that the way in which populism interacts with human rights is distinct from the way in which it interacts with democracy and the rule of law. Rising populism will not, inevitably result in the deterioration of the fundamental rights of parts of the citizenry. Even if, as suggested earlier, one might argue that populism, regardless of its variety, has a more uncertain relationship with democracy and the rule of law.

2.1.3 Hungary, Poland, and populism in Europe

Since the rise to power of right-wing parties in Hungary and Poland, the two countries have witnessed a democratic and rule of law backsliding.[31] The actions of these governments have been well-document and amount to a concerted attack on core European values such as democracy, rule of law, respect for human rights, and equality. In this section, we shall only offer a brief overview of the various activities that these populists actors have taken. Our aim is not to reproduce lists of various violations, many of which have been the subject of legal action on the part of the EU. We wish instead to draw attention on the variety of ways that European values could be at risk across the EU, as this is a key target for CRoLEV. During the project, we will produce outputs that examine the actions of populist actors in Poland and

[29] Mudde and Kaltwasser *Populism* 81
[30] Mansbridge and Macedo, 'Populism and Democratic Theory' 64
[31] Detailing backsliding in Poland, see Wojciech Sadurski, *Poland's Constitutional Breakdown* (OUP, 2019); Wojciech Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding in Poland' (2018) Sydney Law School Research Paper no.18/1

Hungary and compare them to activities taking place in other countries, such as Cyprus. This is necessary to raise awareness about the fragility of European values and the various ways in which they might come under attack.

In the previous section we explained how populist agents oppose constitutional mechanisms that establish limits on majoritarianism and the use of political power in general. It is therefore no surprise that populist parties in Hungary and Poland have focused their efforts on softening the impact of rule-of-law constraints. A first target of these attacks is the judiciary. An independent and impartial judiciary is a major instrument that checks and scrutinizes the use of political power within a constitutional democracy. Faced with the danger of having their agendas frustrated by a court eager to uphold the constitution and resist demands that the will of the people is realized no matter what, populist agents in both countries embarked on an attempt to co-opt the courts by, for example, packing them with friendly judges or increasing their dependence on the executive, or otherwise diminishing their powers and ability to block government decisions. Such measures entail the co-opting of supposedly independent mechanisms, such as the courts, to realise the populist agenda. Following 'judicial reforms' the courts become mere tools used to pursue the government's goals, rather than criticize and keep the executive in check.

In Poland, for example, the ruling Law and Justice Party (PiS) forced several judges to retirement by arbitrarily reducing their retirement age. For these actions, the ECJ found Poland to be in breach of EU law.[32] Forcing judges out of the bench enabled the government to pack the court with friendly judges who would not interfere with the government's agenda. A major step enabling that was the reform of the National Council of the Judiciary (the body selecting candidates for judicial appointments). Adding to the National Council non-judges who supported the government, PiS was able to control the selection of candidates and thus shape the face of the country's judiciary. By enhancing the court's dependence on the executive branch, such actions frustrate judicial independence, a key component of the rule of law. Such actions are also, unsurprisingly, unlawful because they violate Article 19 TEU, requiring that all Member States provide effective judicial remedies—a task that is impossible with a biased and partial judiciary.

[32] C-619/18 European Commission v Republic of Poland [2019] ECLI 531 (lowering retirement age for judges); C-192/18 European Commission v Republic of Poland [2019] ECLI 924 (retirement age male and female judges)

The Polish government has also acted in ways that restrict the ability of judges to carry out their judicial functions effectively.[33] By setting up a Disciplinary Chamber to scrutinize judges who 'behave unethically', the government has been able to target judges critical of the regime or unwilling to support the government's agenda.[34] This has also been the subject of legal action by the European Union and the Polish government has announced that it was going to dissolve this Chamber (although it might simply be replaced by another Chamber tasked with similar responsibilities).[35] A further way in which Polish actions violate the rule of law is the establishment of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court, a body empowered with the 'sole competence to rule on issues regarding judicial independence.'[36] A clear danger associated with this body is that it clearly clashes with EU law by refusing the jurisdiction of the ECJ to adjudicate on matters that would otherwise fall within its competence.

Since 2010 and its landslide victory in the parliamentary elections that secured them a supermajority, Fidesz and Victor Orban set out on a mission to reform Hungary.[37] For present purposes, we shall focus on reforms related to civil and political rights, leaving aside those that have to do with the economy.[38] Eager to establish an 'illiberal democracy' as he put it in multiple speeches, Orban managed a slew of reforms that seek to undermine liberal constitutional values. Exploiting its large majority in Parliament, Fidesz was able to amend the constitution, instituting electoral laws that would entrench its political power.[39] Consistent

[33] See Malgorzata Szuleka, Marcin Wolny, Maciej Kalisz. 'The Time of Trial: How do changes in justice system affect Polish Judges?' (Helsinki Foundation for Human Rights, 2019) https://www.hfhr.pl/wp-content/uploads/2019/07/czas-proby-EN_EMBARGO_24072019.pdf accessed 24 August 2022

[34] European Stability Initiative, 'Poland's deepening crisis: When the rule of law dies in Europe' (14 December 2019) https://www.esiweb.org/pdf/ESI-Batory%20Polands%20deepening%20crisis%2014%20December%202019.pdf accessed 24 August 2022

[35] C-791/19, European Commission v. Poland (Régime disciplinaire des juges) [2021] ECLI 596; Daniel Tilles, 'Poland closes judicial disciplinary chamber at heart of dispute with EU' 15 July 2022, Notes from Poland https://notesfrompoland.com/2022/07/15/poland-closes-judicial-disciplinary-chamber-at-heart-of-dispute-with-eu/ accessed 24 August 2022

[36] European Commission 'Press Release: Rule of Law: European Commission refers Poland to the European Court of Justice to protect independence of Polish judges and asks for interim measures' 31 March 2021 https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1524 accessed 24 August 2022

[37] In general, see Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele, 'Disabling the Constitution', (2012) 23 Journal of Democracy 140

[38] For economic reforms in Hungary and Poland see Tushnet and Bugaric, *Power to the People* 81-86

[39] Miklós Bánkuti, Gábor Halmai, and Kim Lane Scheppele, 'From Separation of Powers to a Government without Checks: Hungary's Old and New Constitution' in Gäbor Attila Töth (ed) *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press, 2012), 268;

with measures taken in Poland, the Hungarian populist party also sought to stifle the judiciary by limiting the court's jurisdiction, lowering the retirement age of judges, and packing the courts with loyalists.[40] Jan Petrov, studying courts in Poland and Hungary, identifies the complex ways in which populist agents use de-politicisation (removing issues from the political space and entrusting them to the courts) and de-judicialisation (removing issues from the courts and entrusting them to the legislature) to solidify their powers.[41] Combining de-politicisation with the court's politicization, for example, they manage a severe blow to the rule of law. Yet resorting to de-judicialisation to remove issues from the court's jurisdiction can also diminish its ability to act as a bulwark against executive abuses.

It is crucial to note that, as Scheppele suggests, even if isolated such reforms may be justifiable, when taken together (or within Hungary's and Poland's specific context, result in authoritarianism.[42] Consider the following example: Orban's government passed a constitutional amendment increasing the number of judges from eleven to fifteen. Such a provision is not generally objectionable—on the contrary, increasing the number of judges could improve a judicial system by making it more efficient and better equipped to handle expanding workloads. But putting this measure in context (combined, for example, with another constitutional amendment that enabled Fidesz to nominate judges without requiring support from the opposition), the evaluation is grim. The measure was only effective in allowing the ruling party to pack the court with friendly judges, thus crippling its scrutinizing role.[43]

Despite pronouncements of a desire to implement an illiberal *democracy*, actions targeting free media, academic freedom, and mechanisms of dissent show that the democracy desired by Fidesz is hollow. Reorganising the Media Authority, the state regulatory agency and establishing a Media Council filled with loyalists, the populist party gained control of the

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Gabriel L. Negretto and Sinlongo Wandan, 'Democratic Constitutional Replacements and Majoritarian Politics: The Cases of Poland (1993– 1997) and Hungary (2010– 2011)' in Gabriel l. Negretto (ed) *Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives* (CUP, 2020), 160– 61

[40] Bánkuti, Halmai, and Scheppele, 'From Separation of Powers' 268

[41] Jan Petrov, '(De-)judicialization of politics in the era of populism: lessons from Central and Eastern Europe' (2021) The International Journal of Human Rights

[42] Kim Lane Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 Governance 559; Tushnet and Bugaric, *Power to the People,* Chapter 5

[43] Tushnet and Bugaric, *Power to the People* 89. For empirical evidence showing a correlation between the political views of those nominating judges and the judges' votes see Zoltan Szente, 'The Political Orientation of the Members of the Hungarian Constitutional Court Between 2010 and 2014' (2016) 1 Constitutional Studies 123.

media.[44] A state-controlled media is unable to carry out its key democratic role of holding the government to account. Merely regurgitating the government's message, it becomes little more than a propaganda machine.[45] Hungarian anti-free-speech actions are unfortunately also replicated in Poland.[46] Dissent is central for any meaningful democracy. Seeking to minimize dissenting voices, the government also enacted legislations that forced the country's Central European University, a mainstay of free academic thought and resistance to Hungary's authoritarian turn, out of the country.[47] The Polish 'lex Gross', named after Professor Jan Gross whose books detailing Polish crimes against Jews provoked immense backlash in Poland, sought to criminalise and severely punish anyone who accused Poland of partaking in any Nazi crimes or being complicit to the Holocaust. Even though criminal actions were removed, the amended law remains and provides for civil sanctions for statements violating the reputation of Poland.[48]

In addition to such attacks, Hungary and Poland have also taken actions that undermine key fundamental rights. The Hungarian Parliament's so-called 'Fourth Amendment' adopted in March 2013 produced measures that weakened human rights protections in many areas. According to this measure, for example, a religious party can only be recognized as such by cooperating with the government. Furthermore, the Hungarian government has maintained hostility against LGBTQ+ rights by, among other things, refusing to recognize transgender people, and limiting adoption to heterosexual couples. Women's rights have also been diminished by populist parties with the Polish government adopted a hard stance against abortion that provoked impressive response with thousands participating in civil disobedience despite COVID restrictions in place at the time.[49] Hampering the ability of NGO's to support Hungarian civil society and contribute to the overall protection of minority interests, Fidesz has also enacted the 'Act on the Transparency of Organisations Receiving Support from

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[44] See e.g., Freedom House, Hungary, 2017
[45] On media influence in Hungary see Attilá Batorfy and Agnes Urbán, 'State Advertising as an Instrument of Transformation of the Media Market in Hungary' (2020) 36 East European Politics 44
[46] See e.g., Timothy Garton Ash, 'For a Bitter Taste of Polish Populism, Just Watch the Evening News' (26 June 2020) *The Guardian* https://www.theguardian.com/commentisfree/2020/jun/25/polish-populism-evening-news-public-broadcaster-presidential-election accessed 24 August 2020
[47] On Lex CEU A.L. Barabaoasi 'Academia Under Fire in Hungary' (2017) 356 Science (American Association for the Advancement of Science) 563
[48] Marta Bucholc and Maciej Komornik, 'The Polish 'Holocaust Law' Revisited: The Devastating Effects of Prejudice-Mongering', (2019) Cultures of History Forum, https://www.cultures-of-history.uni-jena.de/politics/the-polish-holocaust-law-revisited accessed 24 August 2022
[49] See text accompanying notes 92-93.

Abroad'. This requires all NGOs and other foundations to disclose all sources of income and label themselves as 'foreign funded' if they receive money from abroad. The effect of this law was to make the operation of NGOs more difficult, forcing many to flee the country.[50]

This discussion focused on some actions in Hungary and Poland that pose threats to key European values such as the rule of law, democracy, respect for fundamental rights, and individual freedom. Again, this summary offers only a glimpse on the situation in these countries, with much literature delving into the specific ways in which those measures erode and transform Hungarian and Polish democracies. Despite our exclusive focus on Poland and Hungary, one should not assume that the effect of populism is only evident in countries where populists parties control the government. [51] Populist parties not in the government maintain "the ability to put topics on the agenda…and the capacity to shape public policies". Consider, for example, how the burgeoning numbers of UKIP in the 2014 European Parliament Elections 'forced' the Conservative Leader David Cameron to commit to a referendum on the UK's continued membership to the EU. Although UKIP was not a ruling party, the pressure it exerted enabled it to set the agenda for the country's future.

The continued threat populism in Europe poses to key European values makes the sustained evaluation of development in the region imperative. The actions of the populist parties in Hungary and Poland should be studied for their multi-faceted impact on the European project, including for the ways in which they might encourage other Eurosceptic and Eurohostile parties across the continent. Furthermore, attacks on fundamental components of the rule of law emerge as valuable objects of study, for they warrant vigilance as to the ways in which they can have a spillover effect. Other European countries might become tempted to apply some of these attacks, which could set them on a downward spiral resembling that of Hungary and Poland.

2.2 EU institutions and the securing of European values

Faced with the mounting threats to its core values discussed in the previous question, one might have expected robust EU action to discipline recalcitrant countries and affirm, or reaffirm, its commitment to the Article 2 values. On the inaction of the European Union: The inaction of EU institutions is well-documented. Many commentators have, for years, called attention to the dangerous actions of populist agents in Hungary and Poland, exhorting the

[50] See e.g., Laurent Pech and Kim Lane Scheppele "Illiberalism Within: Rule of Law Backsliding in the EU" (2017) 19 Cambridge Yearbook of European Legal Studies 3
[51] KhosraviNik and Mral, *Right-Wing Populism in Europe*

Union to employ its enforcement mechanisms and position itself firmly against such populist actors. Yet the Union's response was chequered, equivocal, and ultimately ineffective. Even though some scholars have sought to explain or even justify the Union's inaction, citing the delicate nature of the conflict between democracy and the rule of law[52], others have been much more critical of the EU's behaviour.[53] The Union, as a whole, has been unable to guarantee that the rule of law, and other values, are effectively protected in Member States. That failure can be attributed to various factors including inertia inevitable in a multi-layered multi-body entity such as the EU, the institutional shortcomings of the Union's structure, and finally the lack of will of key players to decisive act. In this section we shall summarise the key mechanisms available at the EU level to secure Article 2 values, evaluating how they have been used and why they have proved unsuccessful.

2.2.1 Legal Mechanisms

The EU has several mechanisms designed to secure and safeguard Article 2 values, some legal and some non-legal (soft law). Legal mechanisms include the Article 7 procedure, infringement proceedings under Article 258, and the powers vested in the Commission by the conditionality regulation. A further procedure that may contribute to the securing of European values is the preliminary reference request mechanism under Article 267. This last mechanism should, however, be distinguished from the first three identified because it only amounts to an indirect way for EU institutions to protect Article 2 values. Whereas the first three mechanisms depend on an EU institution to initiate them, a preliminary reference must be made by a national court. Let us now turn to these mechanisms and examine how they work, how they have been used, and how effective they have been.[54]

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[52] See e.g., Joseph Weiler, 'Epilogue: living in a glass house: Europe, democracy and the rule of law' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing rule of law oversight in the European Union* (Cambridge: Cambridge University Press, 2016); Armin von Bogdandy 'Fundamentals on Defending European Values', 12 November 2019, VerfBlog https://verfassungsblog.de/fundamentals-on-defending-european-values/ accessed 24 August 2022

[53] See e.g., R. Daniel Kelemen, Tomasso Pavone, Cassandra V. Emmons, 'The Perils of Passivity in the Rule of Law Crisis: A Response to von Bogdandy' 26 November 2019, VerfBlog, https://verfassungsblog.de/the-perils-of-passivity-in-the-rule-of-law-crisis-a-response-to-von-bogdandy/ accessed 24 August 2022. See also Cassandra Emmons and Tommaso Pavone, 'The rhetoric of inaction: failing to fail forward in the EU's rule of law crisis' (2021) 28 Journal of European Public Policy, 1611 on how the rhetoric of inaction found in the statements of EU representatives and others ultimately hampered the Union's ability to effectively act in response to backsliding in Hungary and Poland.

[54] See generally Dimitry Kochenov and Laurent Pech 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 European Constitutional Law Review 512; Werner Schroeder (ed), *Strengthening the rule of law in Europe: from a common concept to mechanisms of*

The Article 7 procedure is the only legal tool at the Union's disposal that is framed explicitly with reference to Article 2 values. Article 7 consists of two mechanisms, the preventive mechanism (Article 7(1)) and the sanctioning mechanisms (Article 7(2)). Following a reasoned proposal by a third of MS, the European Parliament, or the European Commission, according to Article 7 (1), the Council, acting by a four fifths majority, may determine 'a clear risk of a serious breach by a Member State of the values referred to in Article 2'. Once this determination takes place, a dialogue is to commence between the MS thought to be posing a risk for Article 2 values and the Council. Much like many EU actions, the first part of Article 7 leans heavily on robust dialogue. The sanctioning mechanism detailed in Article 7(2) enables to Council to 'determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2'. Yet, crucially, such determination must be the result of unanimity. Article 7 has been called the 'nuclear option', inaccurately as many commentators point out, because of the severe punishment it provides. Once a determination of a 'serious and persistent breach' has been reached, a fresh vote in the Council (this time requiring a qualified majority) may even result in the suspension of a country's rights (including their voting rights). It is clear that the Article 7 was meant to be a severe and rarely used mechanism reserved for only the most egregious violations of Article 2 values by the most persistent perpetrators.

Despite initial reluctance to resort to Article 7, the mechanism was eventually triggered against Poland in 2017 (triggered by the European Commission) and Hungary in 2018 (triggered by the European Parliament). Triggering the mechanism only served to lay bare its structural inadequacy. The requirement for unanimity that obtains for determining the existence of a serious and persistent breach has been impossible to attain, given that countries that have engaged in such activities (i.e., Hungary and Poland) protect each other, vetoing any such conclusion. Bojan Bugaric scathingly argues that the mechanism is useless and in dire need of reform.[55] Commentators have made several proposals aiming to remedy the defects the Article 7 procedure exhibits.[56] Adding on the institutional shortcomings of Article 7, enforcing EU values through the mechanism was further hampered by the reluctance of the

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implementation (Oxford: Hart 2016); Michal Ovádek, 'The rule of law in the EU: many ways forward but only one way to stand still?' (2018) 40 Journal of European Integration 495

[55] Bojan Bugarič 'Protecting Democracy Inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism' in Kochenov and Closa, *Reinforcing Rule of Law Oversight*

[56] Kim Lane Scheppele, 'EU can still block Hungary's veto on Polish sanctions' (Politico, 11 January 2016) http://www.politico.eu/article/eu-can-still-block-hungarys-orban-veto-on-polish-pis-sanctions accessed 24 August 2022

European Commission to use Article 7.[57] As we will see later, the Commission opted to rely on lengthy informal measures under the Rule of Law Framework, designed to enhance dialogue with recalcitrant countries, that only allowed domestic violations of the rule of law to continue.

Infringement proceedings constitute a further legal tool enabling the Commission to protect against violations of EU law. Traditionally, the Commission has interpreted its powers under this procedure very narrowly—typically the mechanism was used to reprimand states for their failure to transpose directives within the required time frame or for their incorrect implementation of a directive.[58] The mechanism emerged as a tool to act against states that failed their obligations under EU law only if that failure was 'within the scope of EU law'.[59] That approach amounted to a self-inflicted constraint—nowhere in the Treaties are the infringement proceedings subject to a restriction of this sort akin to that in Article 51 of the Charter of Fundamental Rights (which restricts the application of the Charter to cases that touch on EU law but not in the MS other domestic activities). Yet in the face of conspicuous rule of law violations in Hungary and Poland and growing pressure from the European Community, the Commission, at least initially, sought to indirectly bring legal actions against violators. To tackle measures lowering the retirement ages of judges in an effort to force them out of the bench, the Commission relied on another well-established ground, namely age discrimination. Ovadek notes, however, the 'glaring insufficiency' on seeking to protect fundamental values such as the rule of law through relying on existing EU law principles.[60] Commentators have been highly critical of the Commission's failures in that respect.[61] It was only after the ECJ's bolder action, in particular in the Portuguese Judges case, that the Commission has more regularly relied on Article 258 to protect the rule of law.[62] In particular, after the seminal decision in the Portuguese Judges case, which essentially recognized that protecting the rule of law extends to ensuring effective judicial remedies

[57] Pech and Scheppele, 'Illiberalism Within' 27
[58] Ibid 13
[59] Ibid
[60] Ovádek, 'The rule of law in the EU' 499
[61] Zoltán Szente 'Challenging the Basic Values – The Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them' in Andras Jakab and Dimitry Kochenov (eds) *The Enforcement of EU Law and Values: Ensuring Member States* (Oxford: Oxford University Press, 2017).; Pech and Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice*
[62] The absence of detailed treaty provisions on Article 2 values (e.g., what they entail, what scope of protection they should be afforded) have hampered the court's ability to secure sufficient protections.

(something provided in Article 19 TEU), the Commission resolved to use the infringement proceedings as a proper instrument for securing the rule of law.

It is important, however, to not overstate the effectiveness of infringement proceedings. Even when used, they may not necessarily result in robust rule of law protections. Consider for example Hungary's Lex CEU, the measure through which the populist government sought to, and managed to, evict CEU from Hungary. That measure reached the ECJ, through an infringement proceedings action, yet by the time the judgment was delivered, the damage was already done with the University having already left the country. Similarly, as Pech and Kochenov note, judgments by the ECJ vindicating the EU and finding the forced retirement of judges unlawful did not lead to the reinstating of those judges.

The most recent mechanism designed to protect the rule of law is Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget. This piece of legislation was the culmination of a desire to ensure that EU funds are not used in violation of the Union's own values. In brief, the regulation grants the Commission discretion to withhold payments to Member States for the violations of the rule of law. Robust as the mechanism might seem, it has never been used. Even after the ECJ deemed the mechanism legal, the Commission has refrained from using it, perhaps fearing that its use might have adverse consequence (e.g., being used domestically by populist parties that will continue to portray the EU as the enemy of the people, thus reinforcing Euroscepticism). It is worth noting that the Parliament has publicly pressed the Commission to activate the Conditionality Mechanism.[63] This regulation becomes the latest example of an arrow in the Union's quiver that is, in practice, unable to effectively protect EU values.

The refusal to use the regulation, coupled with the hesitancy observed earlier regarding the activation of the Article 7 procedure point to a general reality when it comes to the enforcement of EU values. EU institutions, as Claes and Matteo astutely observe, are reluctant to intervene in domestic affairs of MS, an attitude that can be traced to a long-standing distinction in EU law that requires action by EU institutions be limited to specific spheres, refraining from interfering with the national affairs of the states. [64] Be that as

[63] European Parliament Press Room, 'Rule of Law conditionality: Commission must immediately initiate proceedings' 10 March 2022 <https://www.europarl.europa.eu/news/en/press-room/20220304IPR24802/rule-of-law-conditionality-commission-must-immediately-initiate-proceedings>

[64] Monica Claes and Matteo Bonelli. 'The Rule of Law and the Constitutionalisation of the European Union' in Schroeder, *Strengthening the Rule of Law in Europe*

it may, it remains the case that reluctance to rely on legal mechanisms already in place only results in the persistent violation of European values. Even if EU institutions should act with restraint when it comes to the affairs of each MS, they also have an obligation to ensure uniform application of EU law.

For Kelemen and Blauberger, the Union's response to violations of its values in Hungary was 'half-hearted and ineffectual', betraying both a lack of sufficiently potent legal mechanisms and a lack of political will to intervene. [65]

2.2.2 Soft Law

In addition to legal tools at its disposal, the EU has in place various different soft law mechanisms designed to prevent or detect rule of law violations. Much like the legal mechanisms discussed earlier, the effectiveness of such measures is limited. We shall not discuss all soft law tools existing across the EU. The overwhelming majority of these tools are designed to foster dialogue and discussion between EU institutions and recalcitrant MS. Yet two main difficulties obtain regarding such tools. First, excessive emphasis on the need for dialogue when faced with actors who deliberately and maliciously act to undermine fundamental EU values is damaging, for it postpones the use of legal mechanisms that could have significant consequence for violators. Second, the sheer volume of such mechanisms is, as Pech and Scheppele correctly suggest, counter-productive. The Council's Rule of Law Dialogues, they argue, are entirely unhelpful as they simply rely on reports prepared by MS themselves that are then unverified by the Council. In this part, we shall only focus on two non-legal mechanisms, both created by the Commission. First, the Rule of Law Framework (the 'Framework') and second, the Annual Rule of Law Reports.

The Framework, established in 2014, amounts to an early warning mechanism designed to enhance the Commission's ability to detect potential threats to the rule of law and facilitate a structured dialogue with Member States.[66] The Framework was therefore envisaged as mechanism to tackle threats to the rule of law at their initial stages before they escalate to the type of serious violations that would warrant legal action (e.g., Article 7). Melanie Smith castigates the decision to create the Framework. First, she explains, the launch of the

[65] See also Ulrich Sedelmeier, 'Political safeguards against democratic backsliding in the EU: the limits of material sanctions and the scope of social pressure' (2016) 24 Journal of European Public Policy 337.

[66] For a full analysis of the Framework and an evaluation of the process see Dimitry Kochenov and Laurent Pech 'Upholding the Rule of Law in the EU: On the Commission's "Pre-Article 7 Procedure" as a Timid Step in the Right Direction' EUI Working Articles RSCAS (24/2015)

mechanism was misguided from the start with the Commission emphasising the rule of law as moral value, instead of stressing it as a practical power-limiting constitutional principle. Second, the Framework's structure is ineffective, replicating processes that already exist in other mechanism (e.g., the administrative stage of the Article 258 infringement proceedings).[67] Concurring with Smith's critique, Pech and Scheppele, also lament the Framework's emphasis on further dialogue as misguided and ineffective when encountering deliberate attempts to undermine the rule of law. As they point out, even though the framework was belatedly and reticently activated in 2016,[68] it was entirely ineffective with the Polish government ignoring the recommendations made by the Commission and instead challenging the Framework's legality.[69] Pech and Scheppele provide an insightful account of the interaction between the Commission and the Polish government, castigating the Commission for its failure to take immediate action—as explained earlier, instead of activating the Article 7 procedure, the Commission engaged in lengthy processes under the Framework that only worked to exacerbate the rule of law situation on the ground.[70]

The Annual Rule of Law Report is the latest instrument through which the Commission seeks to keep track the development of the rule of law in all MS. The report consists of a section for each MS and is the result of 'close dialogue with national authorities and stakeholders and covers all Member States on an objective and impartial basis, looking at the same issues'.[71] The mechanism has, once again, a preventive function, looking to prevent problems associated with the rule of law 'from emerging or deepening'. For the first time in 2022, the Report also contained recommendations for each MS.[72]

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[67] Melanie Smith, 'Staring into the Abyss: A crisis of the Rule of Law in the EU' (2019) 25 European Law Journal 561, 572

[68] Ibid; European Commission, 'Readout by First Vice-President Timmermans of the College Meeting of 13 January 2016', SPEECH/16/71.

[69] Pech and Scheppelle 'Illiberalism Within' 14; EU Observer 'Poland rejects Commission's 'interferences' on rule of law' https://euobserver.com/eu-political/135716 accessed 24 August 2022; Pawel Sobczak and Justyna Pawlak, 'Poland's Kaczynski calls EU democracy inquiry "an absolute comedy"' (Reuters, 22 December 2016) http://www.reuters.com/article/us-poland-politics-kaczynski-democracy/polands-kaczynski-calls-eu-democracy-inquiry-an-absolute-comedy-idUSKBN14B1U5; accessed 24 August 2022; 'Poland's Kaczynski says EU's call to halt court reforms 'political" (Reuters, 19 July 2017) http://www.reuters.com/article/us-poland-politics-judiciary-kaczynski-idUSKBN1A428S?il=0 accessed 24 August 2022

[70] Pech and Scheppele, 'Illiberalism Within' 27; Smith 'Staring into the Abyss'

[71] European Commission, Press Release, 13 July 2022 https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4467 accessed 24 August 2022

[72] It is worth noting that the Commission adopted the ARoLR after it had rejected the European Parliament's proposal for a mechanism for democracy, the rule of law, and fundamental rights (FDR (2015/2254(INL). Commentators welcomed the proposal, which they saw as a comprehensive tool to

Notwithstanding the merits of the mechanism, it still suffers from significant shortcomings. Perhaps most importantly, the Annual Rule of Law Report remains unconnected to legal enforcement mechanisms. This means that whatever recommendations made in the Annual Rule of Law Report cannot be legally enforced. In a Report offering proposals to improve the Annual Rule of Law Report, Pech and Bard lament the weaker and narrower monitoring mechanism proposed by the Commission (the Annual Rule of Law Report) compared with the Parliament's favoured FDR.[73] It is worth noting that their proposals entail the broadening the conception of the rule of law used to ensure it incorporates substantive democratic and human rights requirement (e.g., including relevant indicators to measure the state of democracy and democratic norms as well as the protection of fundamental rights included in the Charter).[74]

This section suggests that the EU has a series of tools at its disposal, both legal and non-legal. Enforcing the rule of law and other European values has never been about the lack of relevant mechanisms to do so.[75] The relevant mechanisms, however, required robust and decisive action, which was lacking. Instead of relying on existing mechanisms proactively and decisively, Kochenov, Magen, and Pech scrutinize the tendency of EU institutions to 'procrastinate and focus their energy on elaborating new instruments of limited effectiveness'.[76] Continued research is necessary to evaluate both the conditions under which the relevant enforcement mechanisms are used/are not used, the external factors that

protect and safeguard the holy trinity of European values. See e.g., Laurent Pech et al, 'An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights: Annex I' (European Parliamentary Research Service, April 2016) Study PE 579.328; Petra Bárd et al, 'An EU Mechanism on Democracy, the Rule of Law and Fundamental Rights: Annex II' (EPRS, April 2016) Study PE 579.328. See also Wouter van Ballegooij and Cecilia Navarra, An EU mechanism on democracy, the rule of law and fundamental rights: European Added Value Assessment' (2020) European Parliamentary Research Service, https://www.europarl.europa.eu/thinktank/en/document/EPRS_STU(2020)654186 accessed 24 August 2022

[73] Laurent Pech and Petra Bárd, 'The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values' (2022) European Parliament LIBE and AFCO Committees https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2022)727551 accessed 24 August 2022

[74] For a more detailed discussion of the Report and other monitoring mechanisms see Chapter 4

[75] Pech and Bárd 'The Commission's Rule of Law Report'; R.D. Kelemen, 'European's authoritarian cancer: diagnosis, prognosis, and treatment' (2022) 73 FEPS, Progressive Yearbook 2022, 80, 82.

[76] Dimitry Kochenov, Amichai Magen and Laurent Pech, 'Introduction: The Great Rule of Law Debate in the EU' (2016) 54 JCMS 1045, 1048

influence decisions to activate the mechanisms, and the implications of these decisions for Cyprus and other member states of the EU.[77]

2.3 The pandemic and the rule of law

The European Union has recently encountered a further crisis that has put a strain on ordinary constitutional democracies and has put to the test key rule of law components. The COVID-19 pandemic has forced countries around the world to take measures to tackle the spread of the disease.[78] Those measures ranged from country to county: some countries declared a state of emergency according to their constitutional provisions and took extensive measures to enforce lockdowns and other forms of social distancing (see e.g., Germany and France); other countries relied on existing constitutional arrangements to reach similarly extensive measures (see e.g., the United Kingdom), while others adopted milder restrictions (e.g., Sweden).[79] It is worth exploring government responses to the pandemic for two reasons. First, taking emergency measures affects fundamental rights. Although the restriction of fundamental rights might be legitimate, one ought to scrutinise and evaluate those decisions in order to ensure that no abuse of power takes place, and no groups see their rights affected disproportionately. Second, responding to the pandemic might entail acting in ways that stress the rule of law. Emergency powers typically place enhanced powers in the hands of executive agents. If the rule of law is a bulwark against the use of political power, then emergency powers sit uneasily with the rule of law. Further rule of law concerns obtain: lack of transparency in taking decisions meant to limit the spread of the disease,[80] diminished access

[77] European Parliament Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights, (2016) File number: LIBE/8/04625. P.5 (warning that failure to protect EU values in one MS will result in their violation elsewhere)
[78] See Erin Houlihan and William Underwood, 'Emergency Law Responses and the COVID-19 Pandemic: Global State of Democracy Thematic Paper 2021' (International IDEA, 2021)
[79] For legal responses to the pandemic see Joelle Grogan, 'COVID-19, The Rule of Law and Democracy. Analysis of Legal Responses to a Global Health Crisis' (2022) Hague Journal of the Rule Law
[80] Michael Meyer-Resende, 'The Rule of Law Stress Test: EU Member States' Responses to COVID-19, VerfBlog' (24 May 2020) https://verfassungsblog.de/the-rule-of-law-stress-test-eu-member-states-responses-to-covid-19/ accessed 24 August 2022

to justice,[81] lack of legal certainty[82] due to the constantly-amended government measures, and so forth. Even though COVID-19 has been around for over two years, it is vital to monitor and evaluate the government responses to it since the exercise of government powers could have long-lasting effects.[83]

Even before the advent of COVID-19, there was significant debate about the status of emergency powers and their compatibility with the rule of law.[84] States of emergency are declared temporarily and result in the granting of enhanced powers to executive agents in order to respond to an 'extraordinary situation posing a fundamental threat to a country'.[85] Against the normal constitutional arrangements, an exceptional situation requires exceptional responses that do not abide by the typical, normal, decision-making procedures. A key point that ought to be stressed is that states of emergency are, and ought to be, temporal. A perpetual state of emergency blurs the distinction between normalcy and exception and contravenes the fundamental logic of states of emergency.[86]

Before the COVID-19 pandemic, states of emergency were regarded with scepticism. The historical experience indicated that declarations of states of emergency was abused by autocracies that sought to consolidate their powers.[87] The example of the Weimar Republic in 1933 stands out: after the Reichstag fire, and relying on Article 48 of the Weimar Constitution, Hitler was able to enact several pieces of emergency legislation. In the 1930s,

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[81] Diogo Esteves, and Kim Economides, 'Impacts of COVID-19 – The Global Access to Justice Survey' (24 May 2020) VerfBlog, https://verfassungsblog.de/impacts-of-covid-19-the-global-access-to-justice-survey/ accessed 24 August 2022

[82] As Constantinos Combos notes, the government was forced to adopt 13 executive decrees in 20 day. Constantinos Combos, 'Constitutional Improvisation and Executive Omnipotence: the Cypriot Handling of the Pandemic' (2 March 2021) VerfBlog, https://verfassungsblog.de/constitutional-improvisation-and-executive-omnipotence-the-cypriot-handling-of-the-pandemic/ accessed 24 August 2022

[83] For the Union's response see Joelle Grogan, 'The Limited Role of the European Union in the Management and Governance of the COVID-19 Pandemic' (2021) 18 International Organizations Law Review, 482; Wolfgang Weiss, 'Pandemic and Administrative EU Soft Law: Persistent Challenges to the Rule of Law in the EU and Possible Solutions' (2022) 15 Review of European Administrative Law 7

[84] For a summary of types of emergency powers across Europe see European Commission For Democracy Through Law, Emergency Powers (Council of Europe Publishing 1995). https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1995)012-e accessed 24 August 2022

[85] Venice Commission, 'Respect for Democracy, Human Rights, and the Rule of Law during States of Emergency: Reflections' (2020) CDL-AD(2020)014

[86] For a detailed analysis of multiple models of emergency powers see John Ferejohn and Pasquale Pasquino, 'The law of the exception: A typology of emergency powers' (2004) 2 International Journal of Constitutional Law, 210

[87] Ibid, 216

there was frequent reliance on Article 48—in fact, the transition from the Weimar Republic to the Third Reich was built on a perpetual state of emergency.

As can be apparent, the fit of states of emergency and the rule of law is uneasy to say the least.[88] By the sheer fact that emergencies entail the bypassing of ordinary constitutional provisions, they clash with core rule of law principles that require both that all decisions are taken subject to established and entrenched procedures known to everyone and that the use of power by executive agents is always rooted in law. This is not to suggest that emergency powers are principally incompatible with the rule of law—as we shall see, on one reading, emergency powers cohere with the rule of law.

For the German political theorists Carl Schmitt, emergency powers resemble a black hole of legality.[89] For Schmitt, that is unsurprising: the Sovereign is supposed to decide on what amounts to an exception and what laws are to apply on that occasion.[90] Because it all reduces to a decision by a sovereign, the decision cannot be based on law (as the sovereign is the author of all law.[91] According to the Schmittian logic, declaring a state of emergency suspends the rule of law and enables executive agents to use their powers in ways not previously possible. That use of powers may of course be morally justified because it is considered the best possible way to counter an emergency: in times of crisis, decisive and robust action would more likely result if ordinary, complex, and lengthy democratic processes are put aside.

By contrast, some seek to reconcile the use of emergency powers with the rule of law.[92] Assuming that the declaration of a state of emergency follows procedures laid down in a country's constitution, the problem ameliorates.[93] If the order authorising executive powers to act to counter an emergency is ultimately rooted in law, then the rule of law remains unscathed. In general, some principles emerge as key to ensure the compatibility of emergency powers with the rule of law: the use of the powers must be necessary, it must be

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[88] See e.g., Victoria Carmichael and Gregoire Webber, 'The Rule of Law in a Pandemic' (2021) 46 Queen's Law Journal 317
[89] Carl Schmitt, *Political theology: Four chapters on the concept of sovereignty* (University of Chicago Press, 2005)
[90] Ibid 5
[91] Ibid 10-13
[92] See, for example, Andrej Zwitter 'The Rule of Law in Times of Crisis: A Legal Theory on the State of Emergency in the Liberal Democracy' (2012) 98 Archives for Philosophy of Law and Social Philosophy, 95
[93] Hans Kelsen, *Introduction to the problems of legal theory* (Oxford University Press, USA, 1997) 289-290

proportional, the state of emergency must be temporary, the decisions undertaken during the state of emergency ought to be subject to effective scrutiny (parliamentary and judicial), and there must obtain effective cooperation among state institutions.[94] It is worth noting that the use of emergency powers we have witnessed in Europe over the last two years does not fully embody those principles. This is not to suggest that the rule of law did not obtain when those measures were taken. Respecting the rule of law is a matter of degree—to the extent that some of these principles were not fully respected, there was a deterioration of the rule of law, but not necessarily a rule-of-law-vacuum.

Given the variety of government actions across the EU, there is urgent need to monitor the ways in which governments use their powers to limit the spread of the disease. Even though extensive measures to limit the spread of the disease have diminished over the last year, it remains the case that new waves of the disease could result in the limitation of individual rights once more. Additionally, vigilance is warranted when it comes to measures taken during the pandemic that could have long-lasting effects. In Poland, for example, the populist government sought to severely restrict women rights during the pandemic by enacting stringent restrictions on abortion rights.[95] The measures provoked widespread protests that saw thousands of Poles engaging in public demonstrations and civil disobedience.[96] Another type of concerning behaviour relates to measures taken ostensibly to tackle the pandemic but which in reality aimed at cementing a governing party's hold on power.[97] For example, Fidesz exploited the pandemic to enact legislation allowing the government to rule by decree—and then relying on those emergency powers to take action on a variety of issues unrelated to the pandemic.[98] Facing backlash, both domestic and internationally, the government walked back

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[94] This list is adapted from the Venice Commission 'Respect for Democracy, Human Rights, and the Rule of Law during States of Emergency: Reflections'

[95] See e.g., Sandrine Amiel, 'A year on, Poland's abortion ruling is causing 'incalculable harm' to women and girls' *Euronews* 22 October 2021 https://www.euronews.com/my-europe/2021/10/22/one-year-after-poland-s-anti-abortion-ruling-eu-urged-to-act-to-uphold-women-s-rights accessed 24 August 2022. See also Ed Holt 'Poland to Introduce Controversial Pregnancy Register' (2022) 399 The Lancet (British edition) 2256

[96] Pieter Haeck, 'Polish protests erupt against abortion law after woman's death' *Politico* (7 November 2021) https://www.politico.eu/article/poland-protest-abortion-law-death-woman/ accessed 24 August 2022

[97] See e.g., Radosveta Vassileva, 'Bulgaria: COVID-19 as an Excuse to Solidify Autocracy?' (10 April 2020) VerfBlog, https://verfassungsblog.de/bulgaria-covid-19-as-an-excuse-to-solidify-autocracy/ 24 August 2022

[98] Hungarian Spectrum, 'Decrees That Have Nothing To Do With The Coronavirus Pandemic' 1 April 2020, https://hungarianspectrum.org/2020/04/01/decrees-that-have-nothing-to-do-with-the-coronavirus-pandemic/ accessed 24 August 2022

most provisions of the measures but eventually left it with more power than before.[99] In a similar vein, abusive governments may rely on a state of emergency to severely and disproportionately damage key democratic elements such dissent. Hungary, for example, enacted legislation ostensibly seeking to limit fake news and misinformation, have attempted to criminalise speech regarding the pandemic that contravenes the government's official statements.

One might notice that the examples used in this section are primarily drawn from Poland and Hungary. This is not accidental given the general rule of law and democracy backsliding taking place in those countries even before the pandemic. Given their general disregard for rule-of-law-constraints, it is unsurprising that autocratic governments will exploit the pandemic in order to entrench their positions of power and further their agenda. It would nevertheless be a mistake to suggest that it is only in these two countries that one can detect actions that seem to threaten European values. Especially in earlier stages of the pandemic, many of the actions taken throughout Europe were contrary to basic rule of law requirements. As Michael Meyer-Resende observes, many measures taken in those early stages that should have been enacted through law, were instead realised through government decrees or administrative decisions.[100]

The pandemic has, additionally, had more wide-ranging effects on European values that require specific attention. Limiting certain fundamental rights to curtail the spread of a respiratory disease is legally justified, assuming the measure is proportional and necessary to achieve the relevant end of public health.[101] Yet government actions spilled over to other rights not directly the target of the pandemic. For example, government-imposed lockdowns were seen as necessary, especially at the earlier stages of the pandemic. But such lockdowns did not only limit rights of free movement. They also increase the risk of harm for vulnerable

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[99] Kriszta Kovács, 'Hungary's Orbánistan: A Complete Arsenal of Emergency Powers' (6 April 2020) VerfBlog, https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/ accessed 24 August 2022

[100] Meyer-Resende, 'The Rule of Law Stress Test'

[101] See e.g., Article 52, Charter of Fundamental Rights of the European Union (on how derogations of rights might be justified). See also Article 15 ECHR on derogations because of an emergency. The article also requires that the Council of Europe is 'fully informed of the measures' taken by the states. See also Alan Greene, 'Derogating from the European Convention on Human Rights in response to the Coronavirus pandemic: if not now, when?' (2020) 3 European Human Rights Law Review 262; Hafner-Burton EM, Helfer LR and Fariss CJ, 'Emergency and Escape: Explaining Derogations from Human Rights Treaties' (2011) 65 International Organization 673; Evan Criddle and Evan Fox-Decent 'Human Rights, Emergencies, and the Rule of Law' (2012) 34 Human Rights Quarterly 39

groups, such as victims of domestic abuse. There is also little doubt that pandemic responses exacerbated already diminished rights protections.[102] Looking beyond the obvious infringement of rights that resulted from pandemic measures becomes warranted.

2.4 Cyprus and the state of the Rule of Law

CRoLEV, being based in Cyprus, will explore and evaluate the state of the rule of law and other European values on the island.[103] Before turning to specific shortcomings of the rule of law obtaining in Cyprus and warranting careful consideration, let us first provide a brief overview of the country's history and constitutional evolution. In 1960, the Republic of Cyprus became an independent country following decades of colonial British rule. The Constitution adopted in 1960 was, however, not the result of national collaboration but was imposed.[104] Based on the principle of bi-communality, the constitution provided for the co-administration of Cyprus by the Greek-Cypriot and the Turkish-Cypriot Community. Following intercommunal violence in 1963-1964, this arrangement fell apart with members of the Turkish-Cypriot community withdrawing from administration.[105] The Republic nevertheless continued to function under the law of necessity established in the landmark case of *Ibrahim.*[106] In 1974, after a failed coup attempt against then President Archbishop Makarios, Turkey invaded the island and to this day continues to illegally occupy its northern part despite multiple UN Security Council resolutions requesting Turkey to remove its troops from the island.[107] The Republic of Cyprus, therefore, lacks de facto control over the norther part of the island. In 2004, Cyprus became a member of the EU and despite its turbulent

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[102] See, for example, the case of asylum seekers in reception centres in Cyprus, Stephanie Laulhé-Shaelou and Andrea Manoli, 'A Tale of Two: The COVID-19 Pandemic and the Rule of Law in Cyprus' (30 April 2020) VerfBlog, https://verfassungsblog.de/a-tale-of-two-the-covid-19-pandemic-and-the-rule-of-law-in-cyprus/ accessed 24 August 2022

[103] This section draws from the Country Report submitted to the International Academy of Comparative Law Congress 2022. Andreas Marcou 'Cyprus and the Crisis of Liberal Democracy' (2022) Country Report for Cyprus, IACL Congress.

[104] Savvas Papasavvas, La Justice Constitutionnelle à Chypre (Economica,1998) 258. On the imposition of the Constitution see also Achilleas Emilianides, *Cyprus* (Kluwer 2018) 19

[105] Stanley Kyriakides, *Cyprus: Constitutionalism and Crisis Government* (University Pennsylvania Press 1968); TW Adams, The First Republic of Cyprus: Review of an Unworkable Constitution (1966) 19 *Western Political Quarterly* 475

[106] *The Attorney General of the Republic v. Mustafa Ibrahim and others* [1964] CLR 195

[107] UN Resolution 360/1974 https://digitallibrary.un.org/record/93476?ln=en (last accessed 11.01.2022). See also, Emilianides, *Cyprus* 21-22

history, and multiple constitutional shortcomings, it is today generally identified as a functioning liberal democracy.[108]

Despite that classification, a closer inspection will reveal deep structural shortcomings that undermine the rule of law in Cyprus. The Eurozone crisis and the response to it exposed many of the system's deficiencies.[109] The deposit haircut applied to tackle the crisis, a unique solution never against used for a struggling EU economy, essentially meant that consumers' deposits were appropriated in order to compensate for the losses incurred by the financial sector. Not only did the haircut spark impressive protests,[110] but it also resulted in general disillusionment with the political system. Feelings of frustration and distrust ballooned further after subsequent commissions set up to investigate the crisis (by the Government, the Parliament, and the Central Bank of Cyprus) revealed gross government mismanagement (particularly in the run-up to the financial collapse) and the failure of independent actors (such as the Central Bank of Cyprus) to oversee banking operations. Despite these conclusions, no political agents were effectively held to account.[111]

Scandals that followed the financial crisis have significantly contributed to an increasing sense of discontent and resentment about the state of the political system.[112] Perhaps no scandal provoked such extensive response, both domestic and at the European level than the Golden Passport scheme.[113] The Citizenship by Investment scheme, implemented as revised

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[108] See rankings from Freedom House (https://freedomhouse.org/countries/freedom-world/scores (last accessed 11.01.2022) and Economist, Democracy Index 2020, *EIU*

[109] For a detailed account see Panicos Demetriades. *A Diary of the Euro Crisis in Cyprus: Lessons for Bank Recovery and Resolution* (Springer 2017). Also Stephanie Laulhé-Shaelou and Anastasia Karatzia, 'Some preliminary thoughts on the Cyprus bail-in litigation: A commentary on Mallis and Ledra' (2018) 43(2) *European Law Review* 249; Stephanie Laulhé Shaelou and Athanassiou, 'Cyprus Report' in G. Bàndi et al, *European Banking Union* (FIDE XXVII Congress Proceedings, 1 (Wolters Kluwer, 2016) 269

[110] E.g., Liz Alderman, 'Resistance in Cyprus Grows to Europe's Bailout Plan' New York Times 18 March 2013 https://www.nytimes.com/2013/03/19/business/global/asian-markets-drop-on-latest-euro-concerns.html accessed 24 August 2022

[111] Adonis Pegasiou, Accountability After Crisis: Cyprus, (*Accountability After Crisis Project* 2018) 26-29 http://iosifkovras.com/wp-content/uploads/2020/10/Policy-Report-Cyprus-Eng-Final.pdf accessed 24 August 2022

[112] Eurobarometer surveys at the time show Cypriots' scepticism about their political systems and the EU, with majorities expressing deep distrust for national governments (68%), the parliament (77%) and the EU (75%). Eurobarometer Standard 80, Autumn 2013, https://europa.eu/eurobarometer/surveys/detail/1123 accessed 24 August 2022). See Yiannos Katsourides, Delegitimization accelerated: Democracy, accountability and the Troika experience in Cyprus (2016) 15 *Portuguese Journal of Social Science*, 195-216.

[113] Infringement proceedings were launched against Cyprus (and Malta) on 20 October 2020. European Commission, Press Corner https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1925 accessed 24 August 2022

in the aftermath of the Eurozone crisis, allowed for third-party nationals to acquire Cypriot, and by extension European Union (EU), citizenship by investing in Cyprus.[114] An Al Jazeera documentary investigating the scheme revealed the astonishing ways in which two politicians (belonging to different political parties) were willing to facilitate a (fictional) investor's application despite the investor's criminal record, which would normally disqualify the application. Investigations at the aftermath of the documentary revealed that over half of the passports were issued without due diligence with political actors nonchalantly intervening in the procedures to ensure speedy approval of questionable applications.[115]

The scandal exemplified a deep-rooted culture of corrupt behaviour at the Cypriot political system, with multiple Eurobarometer surveys and other reports suggesting that the public sees corruption as rampant and entrenched.[116] Similar perceptions were reported by businesses.[117] About half of Cypriots believe that political actors in the government and the parliament are involved in corruption (48% and 51% respectively). [118] The 2021 Corruption Index by Transparency International ranks Cyprus 15th in the EU with a score of 53/100. [119]

Such perceptions about the state of corruption in Cyprus are revealing of the ingrained rule-of-law concerns that obtain.[120] Effective rule of law administration is rooted in popular trust in institutions. Declining trust in institutions and their ability to effectively secure the rule of law seriously threatens the latter. Lack of trust in the political system overall is further reflected in declining political engagement, which in turn leads to the impoverishment of the democratic order.[121]

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[114] Transparency International, European Getaway: Inside the Murky World of Golden Visas, Transparency International & Global Witness, Berlin/London (2018) (similar schemes run in other countries such as Spain, Hungary, and Portugal).
[115] Michele Kambas, 'Cyprus government broke its own laws countless times in granting passports -inquiry' *Reuters* 7 June 2021 https://www.reuters.com/world/europe/cyprus-government-broke-its-own-laws-granting-passports-inquiry-2021-06-07/ accessed 24 August 2022
[116] 94% of respondents consider corruption widespread in their country (EU average 68%) and 57% of respondents feel personally affected by corruption in their daily lives (EU average 24%). Special Eurobarometer 523 on Corruption (2022).
[117] Flash Eurobarometer 507 on Businesses' attitudes towards corruption in the EU (2022)
[118] Transparency International, 'Global Corruption Barometer–EU 2021' (2021) https://www.transparency.org/en/gcb/eu/european-union-2021 accessed 24 August 2022
[119] Transparency International (2022), Corruption Perceptions Index 2021, 2-3
[120] See generally, State of the Rule of Law in Europe 2022. Reports from National Human Rights Institutions: Cyprus (2022), European Network of National Human Rights Institutions https://ennhri.org/wp-content/uploads/2022/07/Cyprus_CountryReport_RuleofLaw2022.pdf accessed 24 August 2022
[121] E.g., 'Highest abstention rate in Parliament elections in 20 years' *Reporter* 30 May 2021 https://www.reporter.com.cy/politics/article/816685/to-meglytero-pososto-apochis-se-boyleftikes-tin-t

But beyond the lack of trust in institution scandals of corruption engender, corruption is in and of itself an affront to the rule of law. As we shall see, a key tenet of the rule of law is that everyone is subject to the law and that all public officials exercise their powers in accordance with the law. Corruption resembles a breach of the rule of law: public officials abuse their positions of power to further their personal interest at the expense of the common good. Exacerbating the situation, Cyprus has also witnessed a lack of investigation and adjudication of high-level corruption cases, a failure also noticed in the latest Annual Rule of Law Report for Cyprus.[122] Lack of accountability, coupled with rampant corruption, paint a grim picture about the state of the rule of law in Cyprus today.

Within the framework of CRoLEV, we intend to engage in research to evaluate and monitor the state of the rule of law (and of related European Values such as democracy, equality, and respect for fundamental rights) in Cyprus. This involves the empirical investigation of attitudes towards the rule of law, rule of law institutions, and democratic processes. Surveys suggest that Cypriot citizens are disappointed with the general situation in Cyprus and the country's economy, with a majority also dissatisfied about the way democracy works in the Republic.[123] Empirical research will be complemented by evaluative work looking at how the structure of the Cypriot constitution is not only inadequate to tackle cases of corruption, but also contributes to the proliferation of such maligned practices.

Commentators have flagged up the ways in which the Cypriot constitution provides for enhanced executive powers, with the legislative body having a more limited role. [124] The constitution provides weak mechanisms for transparency and accountability of executive decisions. [125] The Commission has also lamented the ineffectiveness of existing mechanisms: asset disclosure of officials, for example, lacks effective, regular, and full verification.

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eleftaia-eikosaetia accessed 24 August 2022; Civicus, *An Assessment of Civil Society in Cyprus: A Map for the Future*, (Nicosia 2005)

[122] European Commission, '2022 Rule of Law Report: Country Chapter on the rule of law situation in Cyprus 2022' <https://ec.europa.eu/info/publications/2022-rule-law-report-communication-and-country-chapters_en>

[123] Eurobarometer, National Report, Winter 2021-2022

[124] Dimitris Melissas, *The Organization of Political Power in the Cypriot State* (Sakkoulas 1996); Constantinos Kombos, 'Constitutional Improvisation and Executive Omnipotence: the Cypriot Handling of the Pandemic' 2 March 2021, VerfBlog, <https://verfassungsblog.de/constitutional-improvisation-and-executive-omnipotence-the-cypriot-handling-of-the-pandemic/> accessed 24 August 2022

[125] Christoforos Christoforou, Heinz-Jurgen Axt, Roy Karradag, '*Cyprus Report: Sustainable Governance Indicators 2020*', (Bertelsmann Stiftung, Germany 2020) <https://www.sgi-network.org/docs/2020/country/SGI2020_Cyprus.pdf> accessed 24 August 2022

Contributing the lack of transparency, Cyprus is one of the lowest ranked countries in public access to information.[126] The judicial system is greatly inefficient, despite recent efforts to reform.[127] Corruption thrives on the existence of structures with weak mechanisms of accountability, little transparency, and scarce popular participation in politics. Such structural defects, we shall argue, result in weak rule of law structures that threaten European values overall. The salient deficiencies of the Cypriot system were on full displayed during the COVID-19 pandemic and the government's response to it. A key issue that CRoLEV will consider is therefore the ways in which the pandemic response in Cyprus exhibits concerns about the state of the rule of law and other European values that are perhaps exacerbated by the existing rule-of-law-deficient climate.

[126] Ibid, 25-28. A relevant law (Ο περί του Δικαιωμάτος Πρόσβασης σε Πληροφορίες του Δημόσιου Τομέα Νόμος του 2017 (184(I)/2017) (in Greek) was only adopted in 2017.
[127] 2021 Rule of Law Report, Country Chapter on the rule of law situation in Cyprus, 5; Figure 6, 2022 EU Justice Scoreboard

3 Conceptualising the Rule of Law

Respect for the rule of law is not simply one of the Article 2 values upon which the European Union is based, nor just a constitutional principle upon which the entire European structure is built.[128] It is, fundamentally, a way in which lawyers, politicians, scholars, and observers can distinguish between 'acceptable' and 'unacceptable' systems—between systems which are to be respected internationally as legitimate and those to be castigated as international pariahs for being illegitimate, using their political power arbitrarily, whimsically, or against the interests of their own citizens.[129] This reality is reflected in immediate responses anyone has to a non-rule-of-law country—such countries are typically derided as autocratic, tyrannical, or dictatorial. Given the normative strength and the practical implications of that term, then, one might expect that there is some agreement on perhaps its most fundamental components. Yet this is precisely where the rule of law problem lies. Even though the term does much heavy lifting in everyday discussions about the legitimacy of this and that regime, or about the objectionable measures that a country adopts, there is a conspicuous failure to agree on what it means. Few concepts have provoked as extensive disagreements and debates as the rule of law.

With a history spanning millennia, the rule of law is one of the oldest concepts in legal and political thought. The rule of law certainly denotes a political system where law rules but what that entails is by no means clear. For Aristotle, administering powers on the basis of the rule of law promised an escape from the unpredictability of the discretionary rule by human beings.[130] And if the rulers were a multitude, as is the case in democracies, the fundamental rules for the operation of collective government had to be established and respected.[131] In the historically earlier approaches to the rule of law, it emerges as intertwined with collective government.[132]

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[128] Laurent Pech, '"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 European Constitutional Law Review 359

[129] Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) 3; Brian Tamanaha 'The history and elements of the rule of law' (2012) Singapore Journal of Legal Studies 237; Martin Krygier, 'The Rule of Law and State Legitimacy', in Wojciech Sadurski, Michael Sevel, and Kevin Walton (eds), *Legitimacy: The State and Beyond* (Oxford, 2019); Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2001) 74 S. Cal. L. Rev. 1307

[130] Aristotle [384-322 BCE], *Politics* (Hackett Publishing, C. D. Reeve, (trans), 1998), 1287a28-32. All subsequent references to the Politics are to this edition.

[131] *Politics* 1287a18

[132] See e.g., Tamanaha, *On the rule of law* Chapter 1. The link between the rule of law and collective government is developed in Section 3.3

Throughout history, the Aristotelian rule of law has evolved. The rule of law emerges as a key theme in the works of theorists such as John Locke and Montesquieu, as well as theorists nowadays classified as 'republican' such as Nicolo Machiavelli, James Harrington, and the Federalists. In modern times, a series of thinkers have engaged with the ideal ranging from Jeremy Bentham, John Austin, F.A. Hayek, A.V. Dicey, Joseph Raz, Lon Fuller, John Finnis, John Rawls, Ronald Dworkin. Different theories today stress different components they associate with the rule of law, some emanating from the Aristotelian account and others not. Let us briefly identify some of these themes. First, for the rule of law to obtain, the law must have some formal conditions met. Unless the law is general, stable, clear, and non-retroactive, it would be unable to effectively guide human conduct and ensure the predictability that human beings seek.[133] Another element typically linked with the rule of law is the principle that no individual person can be above the law. As everyone ought to be subject to the law, the rule of law relates with the idea of political equality.[134] Other commentators also stress the procedural characteristics from which laws ought to emanate. They thus place particular attention on the institutional design of the legal system with separation of powers and the related idea of checks and balances becoming central.[135] Crucially, there is widespread agreement that the rule of law requires a judicial system in place that provides for an independent, impartial, and accessible judiciary that not only resolves disputes between citizens but also, and crucially, holds other branches of government into account.[136] Moreover, the rule of law constitutes a way to describe the relationship between citizens and their legal system. Lon Fuller stressed the idea of congruence: citizens commit to obeying the law as long as the body that administers political power commits to only do so on the basis of established laws.[137] Last, some insist that the rule of law comes with substantive requirements stressing that the fundamental goal of the rule of

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[133] Lon Fuller, *The Morality of Law* (Yale University Press, 1969); H.L.A. Hart, *The Concept of Law* (OUP, 2nd Ed 1994); H.L.A. Hart, *Essays in Jurisprudence and Philosophy*, (Oxford: OUP, 1983) 350-357; Joseph Raz, *The Authority of Law*, (OUP, 1979) 210-231

[134] For some thinkers, this equality is strictly formal, see F. A. Hayek, *The Political Idea of the Rule of Law* (Cairo: National Bank of Egypt 1955) 207-208; A.V. Dicey, *The Law of the Constitution* (10th ed., 1959) 193

[135] Baron de Montesquieu [1689-1755], *Spirit of Laws*. (London: Bell and Sons, J.V. Pritchard (ed) 1914); Alexander Hamilton, James Madison, John Jay, [1755-1804; 1751-1836; 1745-1829] *The Federalist: With Letters of Brutus*. (CUP, B. Terence (ed) 2003)

[136] Jeremy Waldron, 'The Rule of Law', *The Stanford Encyclopedia of Philosophy* (Summer 2020) https://plato.stanford.edu/archives/sum2020/entries/rule-of-law/ accessed 24 August 2022

[137] Fuller, *Morality of Law*, 33. The rule of law is typically thought to require obedience to law, even if a duty to obey the law is more difficult to establish. MBE Smith, 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82 Yale Law Journal, 950; Richard Dagger and Daniel Lefkowitz, 'Political Obligation' *Stanford Encyclopedia of Philosophy* (2014) https://plato.stanford.edu/archives/fall2014/entries/political-obligation/ accessed 24 August 2022

law, protecting individuals from the use of arbitrary power, is inextricably linked with ideas of individual freedom and the securing of personal liberties.[138] In that sense, the rule of law is intimately connected with ideas of fundamental human rights.

The various themes of the rule of law identified here paint a vivid picture. The rule of law is a flexible ideal that has, throughout its long history, become, at times, associated with other political ideals such as democracy, individual freedom, equality, and fundamental rights. **One of the aims of this analysis is to provide a comprehensive account of the various ways in which different approaches to the rule of law accommodate these different themes.** But what becomes clear, at this stage is that the rule of law is a complex ideal. And that complexity has resulted in the term being used in wildly different ways by different agents at different contexts. That is unsurprising for Jeremy Waldron who explains that the rule of law is a 'working political ideal….as much the property of ordinary citizens, lawyers, activists and politicians as of the jurists and philosophers who study it'.[139] Each group will then stress themes related to the rule of law according to their aims.[140]

The inability to reach a consensus about the term has wide-ranging implications. Consider the following example. Poland has been at the heart of discussions about rule of law backsliding in the EU for the last few years. Yet in a speech at the European Parliament, Polish Prime Minister Mateusz Morawiecki defended Poland's rule of law record arguing that 'everyone will understand this concept [i.e., the rule of law] differently to some degree'.[141] In a similar vein, responding to the European Commission's 2016 decision to launch an inquiry into the rule of law in Poland, Law and Justice (PiS) strongman Jaroslaw Kaczynski ridiculed the decision as 'absolute comedy' because 'there is nothing in Poland that contravenes the rule of law'.[142] Such statements exploit the inherent ambiguity about what the rule of law actually

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[138] See e.g., Thomas Bingham, *The Rule of Law* (Allen Lane, 2010); Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985)
[139] Waldron, 'The Rule of Law'
[140] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', in Richard Bellamy (ed.), *The Rule of Law and Separation of Powers* (Ashgate, 2005)
[141] Mateusz Morawiecki, Statement by Prime Minister Mateusz Morawiecki in the European Parliament (19 October 2021), https://www.gov.pl/web/primeminister/statement-by-prime-minister-mateusz-morawiecki-in-the-european-parliament accessed 24 August 2022
[142] Pawel Sobczak and Justyna Pawlak, 'Poland's Kaczynski calls EU democracy inquiry "an absolute comedy"' *Reuters,* https://www.reuters.com/article/us-poland-politics-kaczynski-democracy/polands-kaczynski-calls-eu-democracy-inquiry-an-absolute-comedy-idUSKBN14B1U5 accessed 24 August 2022

encompasses.[143] If everyone adopts different approaches to the rule of law, and the rule of law is a truly multi-faceted concept, then even a country widely disparaged for its rule of law track-record can claim to simply be working from a different conception. Unsurprisingly, such relativism can have destructive consequences with various countries, including authoritarian regimes, laying a claim to the legitimating effects of the rule of law while relying on an extremely impoverished, if even outright perverse, conception of the ideal.[144] It is no surprise then that Judith Shklar argued in a 1987 essay that the term has 'become meaningless thanks to ideological abuse and general over-use', on its way to become a 'self-congratulatory rhetorical device'.[145] In light of the way that term has been invoked by figures ranging from Kaczynski to Vladimir Putin,[146] it might appear difficult to resist Shklar's comments. Yet simply ridding political discourse from the term is untenable. The rule of law is deeply rooted in the political vocabulary not only of constitutional liberal democracies but of other constitutions around the world. To study, then, the rule of law and the different ways in which it appears in different contexts remains a valuable enterprise that could result in significant outcomes.

This section attempts a review of the varying ways in which theorists have sought to conceptualise the term. The first section offers an overview of thin approaches to the rule of law. Thin approaches include ways to conceptualise the rule of law that prioritise the law's formal and/or procedural characteristics, over the substantive content it ought to have. By contrast, thick or substantive approaches, which are explored in the second section, additionally require some substantive features that the resulting legislation ought to possess if

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[143] See Judit Varga, 'Facts You Always Wanted to Know about Rule of Law but Never Dared to Ask' Euronews (22 November 2019) www.euronews.com/2019/11/19/judit-varga-facts-you-always-wanted-to know-about-rule-of-law-hungary-view> accessed 24 August 2022. For a critical assessment of the different claims made by Judit Varga see RD Kelemen, Laurent Pech, Alberto Alemanno, 'Responding to Judit Varga: Separating facts from propaganda about the rule of law' *Euronews* (25 November 2019) https://www.euronews.com/2019/11/25/responding-to-judit-varga-separating-facts-from-propaganda-about-the-rule-of-law-view accessed 24 August 2022

[144] Jeremy Waldron, 'Rule by Law: A Much Maligned Preposition' (2019) NYU School of Law, Public Law Research Paper 19, (example of China at pp. 7-8); Brian Tamanaha, 'The Rule of Law for Everyone?' (2022) 55 Current Legal Problems 97; Neil MacCormick, *Rhetoric and The Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005)

[145] Judith Shklar, 'Political theory and the rule of law' in Allan Hutchinson & Patrick J. Monahan (eds.), *The rule of law: Ideal or ideology*. (Toronto: Carswell, 1987) 1-16

[146] See for example Maria Popova 'Putin-style "Rule of Law" & the Prospects for Change' (2017) 146 Journal of the American Academy of Arts & Sciences, 64 who explains the gaps between how Vladimir Putin approaches to question of the rule of law, and how his critics (domestic and international) rely on different conceptions.

the rule of law is to be observed. Each of these two sections outlines and evaluates the ideas of key theorists who have been particularly influential in shaping rule of law discussions.

The third section offers a way beyond the strict thin and thick divide by adopting a model of the rule of law that eschews stark distinguishing lines for a more gradual and flexible approach. **The way in which we choose to conceptualise the rule of law is critical for the purposes of our project, as future activities, including the empirical work we will carry out, will be framed in accordance with the proposed conceptualisation.** It should be clear from the outset that the choice of a specific way to conceptualise the rule of law does not constitute a claim that this is the only worthy definition of the rule of law. In other words, we do not intend to suggest a way to settle the long debate about what the rule of law *truly* entails. Such attempts are fundamentally counter-productive. **Instead, our choice of a way to conceptualise the rule of law reflects a desire to respect the long history of the term as a legitimating mechanism combined with a necessity for a flexible approach that can better grasp connections between the rule of law and other European values such as democracy, and individual freedom that appear to be widespread in political communities of contemporary western liberal democracies.**[147] In that sense, the conception of the rule of law adopted in this project is sensitive to the specific socio-political context of the EU and other contemporary liberal democracies.[148] The final section offers a brief outline of how the rule of law has been used by European institutions.

3.1 Mapping the field: thin conceptions of the Rule of Law

Theorists propose various ways in which the themes and components identified earlier can be classified. Brian Tamanaha adopts a broad distinction between thin and thick conceptions of the rule of law.[149] Jeremy Waldron opts for a three-fold distinction between formal, procedural, and substantive approaches.[150] As we will argue later, none of these distinctions are entirely rigid. In fact, Tamanaha's binary distinction is further broken down into sub-classifications. The sub-classifications under the thin umbrella reflect, to some extent, the formal/procedural distinction Waldron advances. For example, moving from what Tamanaha dubs the 'Formal Legality' model, which sees the rule of law strictly in terms of adherence to

[147] See e.g., UN, 'What is the Rule of Law' https://www.un.org/ruleoflaw/what-is-the-rule-of-law/#:~:text=It%20requires%20measures%20to%20ensure,and%20procedural%20and%20legal%20transparency accessed 24 August 2022
[148] Tamanaha, *On the Rule of Law* 4
[149] Ibid
[150] Waldron 'The Rule of Law'

formal characteristic such as generality and publicity, to the 'Democracy and Legality', which adds a requirement that laws emanate from democratic processes, reflects adding procedural requirements to a primarily formal account. [151]

In reviewing existing literature on the rule of law, we will adopt the broader thin/thick division for two reasons. First, the key point of contention when it comes to conceptualising the rule of law is whether it contains any conditions or limitations about the content of law. **As a result, it would make sense to distinguish between all those approaches that entwine with substantive values, which thus shape the substantive content of the laws, and those approaches that eschew any such connection with substantive values.** The binary divide between thin and thick theories captures that aim. Second, the two categories Waldron identifies as non-substantive, namely formal and procedural approaches, may be difficult to distinguish. As will become apparent, theorists opting for thin conceptions of the rule of law typically combine formal characteristics (that the law is for example general) with procedural (that the law is the result of a specific type of process). This section identifies various key theorists advocating thin models of the rule of law such as Joseph Raz, Friedrich Hayek, and A.V. Dicey before proceeding to an evaluation of thin approaches.

3.1.1 From Fuller to Raz

The thinnest approach to the rule of law entails looking at the ideal as comprising formal requirements that laws must maintain.[152] The American legal philosopher Lon Fuller famously identified eight principles of legality that each system ought to ensure if it is to count as a legal system at all. Fuller explains the importance of those principles through the allegory of a ruler who seeks to use law to rule but, at every turn, commits a fatal flaw leading to a failure to effectively achieve his goals.[153] Those eight failures to make law mirror eight formal requirements that all laws must possess. In summary, the rules must be expressed in general terms (generality), be publicly promulgated (publicity), be prospective (non-retroactivity), be expressed in intelligible language (clarity), be consistent with one another (consistency), not require conduct that is beyond the powers of the subjects (non-impossibility), not be changed so frequently that subjects cannot rely on them (stability), and be administered in a way that is consistent with the way they are worded (reciprocity).[154]

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[151] Tamanaha, *On the Rule of Law* 97
[152] Cf Tamanaha's classification, ibid
[153] Lon Fuller, *The Morality of Law* (Yale University Press, 1969) 33-42
[154] Ibid.

Those principles of legality represent, for Fuller, the inner morality of law, which is to be distinguished from the law's external morality. The latter refers to the substantive moral content of laws.

Given Fuller's emphasis on those formal characteristics, one might assume that Fuller proposes a thin conception of the rule of law. But this is inaccurate. Far from neutral, Fuller thought that the eight principles represented concrete moral values. At the heart of Fuller's account is a commitment to the law as a purposive enterprise seeking to "achieve [social] order through subjecting people's conduct to the guidance of general rules by which they may themselves orient their behavior".[155] Underlying law's function is a deep conviction in human agency and dignity—the law ought to manifest those principles of legality because only then would it respect human agency and treat subjects with dignity.[156] Considering this, it is inaccurate to classify Fuller as a thin rule of law theorist.

Despite Fuller's attempt to solidify a link between those principles of legality and moral principles, Hart and Raz insist that these principles of legality are purely principles of efficacy. For Raz, the rule of law is a morally neutral instrument that could operate to further justice or injustice—just like a sharp knife that can help perform life-saving surgeries or vicious murders.[157] Hart concurs insisting that the principles of legality 'are compatible with great inequity'.[158] This becomes a core element of thin approaches to the rule of law: a formal conception of the rule of law that only imposes specific requirements on the characteristics that laws have (are they general? Are they clear? Have they been publicly promulgated?) cannot guarantee that the legal system will result in justice. This means that the rule of law model adopted is purely instrumental with absolutely no connection with substantive values.

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[155] Lon Fuller, 'A Reply to Professors Cohen and Dworkin' (1965) 10 Villanova Law Review 657

[156] Fuller *Morality of law* 40; Kristen Rundle, 'Fuller's Internal Morality of Law'. (2016) 11 Philosophy Compass, 499; NE Simmonds, *Central issues in jurisprudence: Justice, laws, and rights* (Sweet & Maxwell, 2013) 258-260; Tamanaha *On the Rule of Law* 95

[157] Joseph Raz, *The Authority of Law*, (Oxford: Clarendon Press, 2009), 224-226. Similarly, see Matthew Kramer, 'On the Moral Status of the Rule of Law' (2004) 63 Cambridge Law Journal, 65. Rejecting this suggestion through the analysis of empirical data, Simmonds argues that there is nothing to suggest that vicious tyrants resort to the principles of legality in order to enhance the efficiency of their tactics, NE Simmonds, 'Straightforwardly False: The Collapse of Kramer's Positivism' (2004) 63 Cambridge Law Journal, 98; NE Simmonds, 'Law as a Moral Idea' (2005) 55 University of Toronto Law Journal, 61

[158] H.L.A. Hart, The Concept of Law (OUP, 2nd Ed 1994), 207. Joseph Raz, 'The Rule of Law and its Virtue' in Joseph Raz, *The Authority of Law*, (Oxford: Oxford University Press, 1979) 220–221

For Raz, the key characteristic law should have is the ability to guide the behaviour of its subjects.[159] And this shapes Raz's preferred (thin) approach to the rule of law. If what is necessary is that the laws guide their subjects' behaviour, then there are some basic principles that ought to be satisfied. Raz identifies eight principles. The first three relate to the formal standards laws should observe if they are to guide behaviour (all laws should be prospective, open, and clear; they should be relatively stable; and the making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules), and they include formal and procedural requirements, which are nevertheless strictly neutral—they embody no requirement for the substantive content of the laws. The other five principles identified refer to the way in which the legal machinery is to be structured in order to ensure adequate enforcement of the law (this includes, among others, independence of the judiciary and access to the courts).[160] Raz's eight principles combine the formal and procedural requirements that are typical in thin models of the rule of law, with a strong emphasis on courts and the judiciary as the par excellence rule of law institutions.[161] Raz recognises that the rule of law serves many different values, such as the ability to devise and follow one's life plan and actions under the (stable and predictable) environment constructed by the rule of law, individual freedom, and respect for human dignity.[162] Yet Raz is adamant that the rule of law does not prevent violations of human dignity or individual freedom. In fact, as he explains, a law can institute slavery without violating the rule of law. **Even if the rule of law is one of the values of the legal system, and even if it can benefit other values, there is no inherent analytic connection between the rule of law and them.**

3.1.2 A.V. Dicey

Given A.V. Dicey's footprint on English constitutional law and legal thought in general, of core relevance to CRoLEV, his theory warrants some analysis. For Dicey, the rule of law is one of the two tenets on which the legal system is based with parliamentary sovereignty emerging as the second. The idea of sovereignty may clash with the concept under study. Sovereignty entails the idea that a body, in the UK's case, the Parliament, can make or

[159] Raz 'Rule of Law and its Virtue' 214
[160] Ibid 214-219
[161] Paul Craig detects some changes in Raz's account of the rule of law in his book Joseph Raz, *Ethics in the Public Domain, Essays on the Morality of Law and Politics* (OUP 1995). In particular, Craig explains that Raz places greater emphasis on judicial activity as a mechanism to maintain the rule of law, which in turn, and as we shall see later, invites questions about the role of individual rights in adjudication. Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) Public Law 467, 484
[162] Raz, 'Rule of Law and its Virtue' 220-222

unmake any laws it wishes, being legally unbound by any previous laws or principles.[163] By contrast, the rule of law is a concept supposedly designed to *constrain* the use of political power. Depending how it is framed, the rule of law could potentially require that limits be placed on the power exercised by a political sovereign. Dicey was nevertheless unconcerned about this clash, primarily because his formulation of the rule of law is thin enough to accommodate both tenets.

Dicey proposes three principles that comprise the rule of law. The first is that 'no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint'.[164] There are several themes emerging from this first principle. First, all laws must result from the appropriate procedure, 'the ordinary legal manner'. This indicates a commitment to a procedural tenet of the rule of law: the substantive content of the law does not matter as long as it is the result of the correct procedure. Second, all political power must be exercised according to laws, for otherwise its use is discretionary and arbitrary and thus objectionable.[165] That second theme harkens back to Aristotle's rejection of the rule of human beings as inherently unstable and whimsical. The law, by contrast, ensures non-arbitrary and non-objectionable use of power.

The second principle dictates that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'.[166] Equality is the key element here. Crucially, that equality is purely formal—everyone is subject to the law regardless of any specific characteristic.[167] Contrary to substantive approaches that might link the rule of law with substantive equality,[168] Dicey insists that rule

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[163] See e.g., John Austin, *The Province of Jurisprudence Determined*, (CUP, Wilfrid E. Rumble (ed.), 1995); A.V. Dicey, *The Law of the Constitution* (10th ed., 1959)
[164] Dicey, *The Law of the Constitution* 188
[165] Paul Craig raises questions whether Dicey uses arbitrariness in a formal or substantive manner, which could have an impact on Dicey's classification as a theorist defending a thin conception of the rule of law, Craig, 'Formal and Substantive' 471-472. See also T.R.S. Allan, *Law, Liberty and Justice, The Legal Foundations of British Constitutionalism* (OUP, 1994) 46
[166] Dicey, *The Law of the Constitution* 193
[167] Geoffrey Marshall, *Constitutional Theory* (OUP, 1971) 137
[168] E.g., Tamanaha *On the Rule of Law* 76-77

of law necessitates that all are treated equally by the law, notwithstanding how such equal treatment might engender further inequality.[169]

Dicey's third principle of the rule of law, and the most England-specific, suggests that the UK's unwritten constitution, which 'is the result of the ordinary law of the land'[170] provided the utmost guarantee for individual rights. By contrast, attempts in Continental Europe to ensure protections for individual rights through Bills of Rights, were precarious and insufficient.[171] As Paul Craig indicates, this is perhaps the most ambiguous Diceyan principle, as according to one possible interpretation, it might associate the rule of law with the protection of certain rights that all individuals ought to possess.[172] Yet Craig rejects that interpretation, suggesting that it is more plausible to read this as a general defence of the common law approach, which would then remove any requirements that the law protects specific individual rights.[173] What Dicey suggests is that the best way in which individual rights may be protected is through the courts. Dicey's discussion represents a strictly thin conception of the rule of law.[174] **There is nothing in Dicey's analysis of the rule of law to suggest that he in fact envisioned a kind of broad approach that would incorporate any substantive values—even though some of his comments are admittedly ambiguous and could lead to divergent interpretations**.

3.1.3 Hayek

Espousing the idea that laws should fundamentally enable human beings to plan their individual affairs by predicting how government agencies will use their law-derived powers, a belief also prominent in the Razian account, Hayek stresses the importance of the rule of law as a principle ensuring that all government activity is bound by 'rules fixed and announced before-hand'.[175] Reflecting this commitment to predictability, Hayek proposes three principles of the rule of law: generality, equality, and certainty. Like other formalists, he

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[169] Similarly, F.A. Hayek, *The Road to Serfdom* (Chicago: Univ. of Chicago Press 1994) 80–111. Consider Anatole France's pithy remark deriding the commitment to formal (over substantive equality) that the 'law, in its majestic equality forbids rich and poor alike to sleep under bridges'
[170] Dicey, *The Law of the Constitution* 203
[171] Dicey, *The Law of the Constitution* 200-202
[172] Craig, 'Formal and Substantive' 473
[173] Ibid 474
[174] See Geoffrey Marshall, 'The Constitution: Its Theory and Interpretation', in Vernon Bogdanor (ed.), *The British Constitution in the Twentieth Century* (Oxford University Press, 2003) 58
[175] F. A. Hayek, "Preface 1956," in *The Road to Serfdom* (Chicago: Univ. of Chicago Press 1994) 80. At another point, Hayek credits Aristotle for introducing the key ideals of separation of powers, predictability, and government of laws not men, see F. A. Hayek, 'The Origins of the Rule of Law', in F.A. Hayek, *The Constitution of Liberty* (University of Chicago Press 1960) 9

argued that all laws should refrain from targeting individuals and instead be abstract and generally framed. Laws should also ensure formal equality—they should apply equally to everyone with no one being over the law.[176] Last, laws ought to be certain enough to ensure predictability.[177]

Waldron detects in Hayek's works a shift in emphasis when discussing the rule of law.[178] His earlier discussion in *The Road to Serfdom* (1944) portrayed the rule of law as requiring all government power to operate according to impersonal and prospective rules that would allow people to go through their lives capable of predicting how the use of political power would affect their lives. Yet in his later work *Law, Legislation and Liberty* (1973), he reveals a greater concern about the ambiguity of laws and the ability of individuals to predict how their enforcement will affect them.[179] His attention turns to common law as a more effective predictor of the operation of political power. In that sense, Hayek appears to embrace Dicey's third principle of the rule of law, which also prioritises common law administered by judges as the most effective way to ensure the non-arbitrary operation of laws.

Despite Hayek's insistence on the formal characteristics of the rule of law, it is worth considering that he consistently links the rule of law with individual freedom. A proponent of liberalism (albeit of a conservative variety), Hayek placed a premium on individual freedom from excessive government interference. The rule of law, ensuring that the dispensation of political power is done in a general manner, is a necessary component of individual freedom.

> 'My action can hardly be regarded as subject to the will of another person if I use his rules for my own purposes as I might use my knowledge of a law of nature, and if that person does not know of my existence or of the particular circumstances in which the rules will apply to me or of the effects they will have on my plans.'[180]

Even though there are no doubts about whether Hayek's approach to the rule of law is formal, the way in which he links the rule of law with individual freedom is interesting. Freedom, another complex and contested term, could potentially impose substantive requirements. And even though the way Hayek formulates freedom (being able to regulate one's one affairs by predicting how general rules operate—thus imposing no conditions on the content of those

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[176] Hayek, *The Road to Serfdom* 80–111; Tamanaha *On the Rule of Law* 67-68
[177] F. A. Hayek, *The Political Idea of the Rule of Law* (Cairo: National Bank of Egypt 1955) 34
[178] Waldron 'The Rule of Law'. Also, Tamanaha, *On the Rule of Law* 69
[179] F.A. Hayek, *Law, Legislation and Liberty* (University of Chicago Press, 1973) 118
[180] Hayek, *The Constitution of Liberty* 152

general rules) excludes that prospect, it remains the case that one could, relying on a more substantive interpretation of freedom (perhaps requiring that specific freedoms and rights are reflected in the content of the laws), end up with a substantive version of the rule of law.[181]

3.1.4 The Attraction of Thin Approaches

Raz vigorously defends the need to keep the rule of law distinct from other values. As a matter of analytical clarity, he insists that the rule of law ideal should be distinguished from substantive values that have at times been associated with it, such as democracy, human rights, private property, social justice, or social welfare.[182] Waldron concurs warning that 'once we open up the possibility of the Rule of Law's having a substantive dimension, we inaugurate a sort of competition in which everyone clamors to have their favorite political ideal incorporated as a substantive dimension of the Rule of Law…..the result is likely to be a general decline in political articulacy'.[183]

On this view, broadening the potential scope of the rule of law can only lead to confusion with people struggling to speak about the rule of law on the same terms. Consider a new law imposing a specific redistributive measure that provides for slight tax-increases for specific parts of the citizenry (i.e., those earning over a specific threshold) while providing tax breaks for others (e.g., those below the poverty line). On the one hand, some would decry the measure as an affront to the rule of law because it violates an individual's right to hold private property, sometimes portrayed as the fundamental aim of the rule of law.[184] On the other hand, some would celebrate the measure because it would (presumably) further social justice by reducing economic inequalities, in their minds a key rule of law goal.[185] Opening up the door to substantive ideals, formalists warn, invites subjective arguments that depend on each person's political philosophy.[186] Considering the rule of law problem identified

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[181] See, generally, TRS Allan, *Law, Liberty, and Justice*. Freedom can be construed narrowly (e.g., absence of interference, see e.g., Thomas Hobbes, *Leviathan*. (OUP, J.C.A. Gaskin (Ed. and trans.) 2008) or broadly (e.g., requiring political activity, see e.g., Aristotle's *Politics*). The literature on the topic is vast, see e.g., Ian Carter, 'Positive and Negative Liberty' *Stanford Encyclopedia of Philosophy* (2022) https://plato.stanford.edu/archives/spr2022/entries/liberty-positive-negative/ accessed 24 August 2022

[182] Raz, 'The Rule of Law and its Virtue' 211

[183] Waldron 'The Rule of Law'

[184] Ronald Cass, 'Property Rights Systems and the Rule of Law', in E. Colombatto, (ed.) *The Elgar Companion to the Economics of Property Right* (Oxford: Edward Elgar Publications, 2004) 131. See also Richard Epstein, *Property Rights and the Rule of Law: Classical Liberalism Confronts the Modern Administrative State*, (Cambridge: Harvard University Press, 2011)

[185] See for example Tamanaha *On the Rule of Law* 112-113

[186] E.g., Raz, 'The Rule of Law and its Virtue' 211

earlier (the rule of law is a potent device of legitimation but it is also subject to diverse definitions), demands for narrowing the scope of the term, insisting on the exclusion of additional contested ideas become sensible.

Precisely because of its rejection of substantive ideals, thin approaches emerge as largely neutral. As such, they have been touted as capable of universal application—the standards associated with formal or procedural characteristics can be used to evaluate any legal system around the world.[187] By contrast, the incorporation of substantive ideals would undermine attempts to universal application as the specific features of those substantive ideals would, most likely, not be equally neutral.[188] Combining the rule of law with fundamental rights, which despite voices praising their universality are fundamentally the product of liberal societies that prioritise individualism, and using that approach to evaluate a non-western, non-liberal, non-democratic system in another part of the world would be, arguably, untenable.

Claims about the superiority of thin accounts are, however, overplayed. First, they assume a distinctiveness and a separation between the formal/procedural and the substantive dimension of the rule of law that is difficult to sustain. For example, thin accounts all agree that equality before the law is a crucial component of the rule of law. But that requirement, and the mirror claim that no one is above the law, reveal a possible connection between the rule of law and the substantive ideal of democracy (the connection is further explored in Section 3.3). The requirement that everyone is equal before the law is predicated on the simple principle that individuals existing within a society should be subject to the same duties and obligations as prescribed by laws. But this equality is not far removed from the kind of political equality that is at the heart of democracy. We would hardly think that a society infringing access to democratic procedures treats its citizens with the kind of 'equality before the law' that the rule of law warrants. In a very real sense, those excluded from law-making processes are not equal as everyone else before the law—before they did not have the same opportunities as everyone else to shape laws that affect them. Even though Waldron seeks to bypass this concern by speaking of 'values underlying the rule of law', it remains the case that the

[187] But see Tamanaha *On the Rule of Law* 139

[188] This is clearly not the approach adopted by international bodies who propose expansive interpretations of the rule of law that embody a series of substantive values from democracy to human rights. See e.g., Venice Commission, Report on the Rule of Law 512/2009, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e accessed 24 August 2022

distance from values 'underlying' the rule of law to values 'comprising' the rule of law is rather short.[189]

A related problem is that very often thin conceptions of the rule of law are framed in ambiguous terms that might mask substantive values. For example, Dicey, Raz, and others portray the rule of law as a bulwark against the arbitrary use of power.[190] This requirement, as we have seen, also coheres with the history of the term.[191] But whether this is a purely formal/procedural requirement, or a substantive requirement ultimately hinges on how one approaches arbitrariness.[192] Locke identifies the opposite of the rule of law as rule by "extemporary Arbitrary Decrees".[193] What renders those decrees arbitrary is that, being extemporary, they are impossible for citizens to rely on them. Instead, they are subject to individuals who 'force them to obey at pleasure the exorbitant and unlimited Decrees of their sudden thoughts, or unrestrain'd, and till that moment unknown Wills without having any measures set down which may guide and justifie their actions'.[194] Arbitrariness, in a manner reminiscent of Raz and Hayek, is associated with unpredictability. **On a formal reading, then, arbitrariness entails no substantive values.** An official who acts beyond the powers vested in them by a law is acting arbitrarily. Similarly, a committee reaching a solution without following all the steps dictated by law is acting arbitrarily. Arbitrariness, in these examples, is equated with the absence of legal authorisation, unrelated to the specific content of the laws. On another reading, however, arbitrariness creates requirements on the content of a decision.[195] We might suggest that a government agent who reaches a decision that is

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[189] Waldron, 'The Rule of Law'
[190] Raz, 'The Rule of Law and its Virtue' 219; Dicey, *Law of the Constitution* 188
[191] Tamanaha *On the Rule of Law*
[192] There is extensive discussion in political theory about what arbitrariness entails. See for example, Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997) 36-37 (non-arbitrariness associated with tracking the common interests of the public); Philip Pettit *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press, 2012) (non-arbitrariness requires the exercise of political control over decisions); Henry Richardson, *Democratic Autonomy: Public Reasoning About the Ends of Policy* (New York: Oxford University Press, 2002) Ch.3 (non-arbitrariness associated with common good); James Harrington, [1611-1677] *The Commonwealth of Oceana and A System of Politics* (Cambridge: Cambridge University Press, J.G.A. Pocock, (ed), 1992) 24 (non-arbitrariness associated with rationality and enlightened action); Frank Lovett, *A General Theory of Domination and Justice* (Oxford University Press, 2010) 218 (non-arbitrariness requires control by external rules)
[193] John Locke [1632-1704] *Second Treatise on Government* (Indianapolis: Hackett Publishing, 1980) para 136
[194] ibid
[195] See for example how James Harrington identifies arbitrariness with 'unenlightened action'. On this reading, arbitrariness is the opposite of reason. A law that is arbitrary *is* a law that fails to demonstrate rationality Harrington, *Oceana* 24

conspicuously irrational has acted arbitrarily even if she was legally authorised to reach a decision. In a similar vein, some might naturally announce that a government agency acting in ways that conspicuously and deeply infringe on fundamental rights is acting arbitrarily. It becomes clear, then, that the way in which arbitrariness is conceptualised will have a direct effect on whether the rule of law is formulated in substantive or formal/procedural ways.

That ambiguity bedevils Raz's latest work on the rule of law where, one might argue, he maintains a more ambivalent position about the state of the rule of law. In particular, his emphasis on the link between the rule of law and a system of non-arbitrary government power, one might argue, introduces substantive considerations through the backdoor.[196] For Raz, arbitrary government entails acting indifferent to the proper reasons for which power should be used.[197] And although Raz, at multiple points, confirms that determining what those reasons are is beyond the scope of the rule of law, insisting that 'the rule of law does not review the success of politics',[198] one might still wonder whether investigating the reasons for which a government body took a *particular* decision would not require an evaluation of that decisions *substantive content,* examining, for example, whether that content reflects improper reasons for action. **Arbitrariness so defined seems to be introducing some substantive considerations that potentially undermines strict distinctions between thin and thick conceptions of the rule of law.**

3.2 Mapping the field: thick conceptions of the Rule of Law

3.2.1 The Rule of Law and Human Rights: Dworkin and Bingham

Thin conceptions of the rule of law insist that the ideal should be understood solely in terms of its formal/procedural attributes, with no demand being placed on the specific content of a law. To realise the rule of law is to ensure that all laws respect specific formal conditions (generality, prospectiveness, etc.) and emanate from appropriate law-making channels. Thick conceptions do not reject such formal/procedural conditions. They concur that laws should demonstrate specific formal characteristics and that they result from settled processes. But they further insist that the rule of law relates to substantive values that place restrictions/demands on the content of specific laws. **Put another way, thick conceptions of**

[196] Joseph Raz, 'The Law's Own Virtue' (2019) 39 Oxford Journal of Legal Studies 1
[197] Ibid 5
[198] Ibid 6

the rule of law incorporate requirements proposed by thin conceptions but move beyond them.

Throughout the previous section, we have identified various candidate values that have at times been linked with the rule of law, from democracy to freedom, and from human dignity to social justice. But none of these substantive values have managed to capture the attention of legal theorists and practitioners like human rights. **Establishing an inherent connection between the rule of law and human rights has emerged as a strong alternative to thin approaches to the rule of law, and a method that has been adopted by various international bodies and agencies that purport to measure and assess the state of the rule of law in various countries**.[199] Before we turn to these various frameworks (Section 4), it is worth exploring the theoretical framework that accommodates the marriage between the rule of law and human rights. In doing so, we shall focus on the highly influential works of American legal philosopher Ronald Dworkin and the English judge Lord Bingham.

Dworkin's argument for a rights-based approach to the rule of law should be read in light of his overall theory of law. For legal positivists, the study of law is built on the simple premise that the law's existence is divorced from its content (just or unjust).[200] Law's existence is a matter of social facts: whether it is simply the command of a sovereign[201] or established through a pedigree test,[202] the existence of a law has nothing to do with its content. This perception of law as a body of rules leads to a specific approach when it comes to adjudication. Judges make decisions on the basis of rules (properly created and enacted). In peripheral cases, when laws fail to give an answer, judges will resort to applying their judgment.[203] A measure of discretion is therefore necessary to reach a just decision when rules run out. Castigating the positivist account of adjudication, Dworkin insists that it is implausible to think that the operation of legal rules is the sole factor determining judicial outcomes. Even if in straightforward cases legal rules provide the answer, in hard cases, judges do not simply rely on their discretion.[204] They instead apply legal principles: those principles represent the moral values of a political community and can be found in past

[199] E.g., Venice Commission, *Report on the Rule of Law*
[200] Austin. *Province of Jurisprudence* 157; Hart, *Concept of Law* 185-186; Leslie Green and Thomas Adams, 'Legal Positivism' *The Stanford Encyclopedia of Philosophy* (2019) https://plato.stanford.edu/archives/win2019/entries/legal-positivism/ accessed 24 August
[201] Austin, *Province of Jurisprudence* Lecture VI
[202] See e.g., Hart's rule of recognition, Hart *Concept of Law* Chapter V
[203] Ibid Chapter VII
[204] Ronald Dworkin, 'The Model of Rules' (1967) 35 University of Chicago Law Review 22-29; Ronald Dworkin, 'Hard Cases' (1975) 88 Harvard Law Review 1057

judgments.[205] Further laying out his vision of law as integrity, Dworkin suggests that when judges consider how to resolve a case before them, they will resort to that interpretation that best captures the dual test of fit and value. The preferred interpretation is the one that is both consistent with previous judicial decisions and that puts the entire judicial history in the best possible light.[206]

It becomes clear from this brief description of Dworkin's theory of adjudication that a deep connection obtains between law (in its existence, adjudication, and application) and broader questions such as justice (reflected in Dworkin's focus on moral values and principles). It is hardly surprising, then, that when he turns to the rule of law question, Dworkin firmly rejects theories that conceptualise the rule of law in purely formal terms.[207] Such theories that insist that the rule of law simply demands all government action is subject to law that is prospective and publicly announced, offering no input on the content of those laws, Dworkin calls rule-book conceptions.[208] Instead, he favours a rights-based approach to the rule of law. According to this, the rule of law amounts to 'rule by an accurate public conception of individual rights'.[209] Individuals within a political community have specific moral rights, which draw their moral force from the political community itself, and which the law ought to respect and protect.[210] Courts are tasked with enforcing those rights, ensuring that laws are interpreted in such ways, as far as possible, to protect and safeguard those individual rights. The content of the laws ought to be scrutinised to ensure that it is compatible with whatever moral rights individuals have. As Craig explains, for Dworkin, the rule of law becomes simply 'a synonym for a rights-based theory of law and adjudication'.[211] Dworkin's preferred model elevates judicial review to the heart of the rule of law. **The ability of courts to ensure protection of rights by reviewing public decisions becomes a central tenet of the rule of law.**

For Lord Bingham, the fundamental premise of the rule of law is that 'all individuals and all organisations within the state, whether public or private, are bound by and entitled to the

[205] See Dworkin, 'The Model of Rules'
[206] Ronald Dworkin, *Law's Empire*, (Oxford: Hart Publishing, 1986) 169-171
[207] Paul Craig, 'Formal and Substantive Approaches' 477
[208] Ronald Dworkin, *A Matter of Principle* (Oxford: Clarendon Press, 1985) 11
[209] Ronald Dworkin, 'Political Judges and the Rule of Law' (1978) 64 Proceedings of the British Academy 259, 262
[210] Dworkin, *A Matter of Principle* 11-16
[211] Craig, 'Formal and Substantive' 479

benefit of laws prospectively promulgated and publicly administered in the courts'.[212] From this general and broad point, that in no way contradicts the principles laid down by thin conceptions of the rule of law discussed earlier (perhaps with the exception of the reference to 'the benefit of laws' insofar as this indicates that laws have a specific content that is of benefit to legal subjects), Bingham proceeds to identify eight distinct sub-rules. The eight sub-rules, which flesh out Bingham's broad model of the rule of law, are as follows:

(i) The law must be accessible and so far as possible intelligible, clear and predictable
(ii) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion
(iii) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation
(iv) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably
(v) The law must afford adequate protection of fundamental human rights
(vi) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona de civil disputes which the parties themselves are unable to resolve
(vii) Adjudicative procedures provided by the state should be fair
(viii) The rule of law requires compliance by the state with its obligations in international law as in national law[213]

Many of those sub-rules embody principles that are well-established in relevant literature, such as the formal requirements that the law is intelligible, clear, and predictable (sub-rule 1), or that everyone is equal before the law (sub-rule 3). We shall rather focus on the more contentious of those rules, and the one firmly placing Bingham's approach within the fold of thick models, namely sub-rule 5, which requires that all laws must afford sufficient protections for fundamental human rights. That is not to suggest that the fifth sub-rule is the only one imbuing Bingham's account with substantive requirements. For example, sub-rule 4 requires that ministers and public officials ought to act fairly and reasonably. But both these

[212] Thomas Bingham, *The Rule of Law* (Penguin, 2010) 11-12; Thomas Bingham, Sixth Sir David Williams Lecture: The Rule of Law (Nov. 2006) https://www.cpl.law.cam.ac.uk/sir-david-williams-lectures2006-rule-law/rule-law-text-transcript accessed 24 August 2022
[213] Bingham, *The Rule of Law*

values (fairness and reasonableness) could be construed as substantive conditions that shape a decision's content. A judge called to decide if a public official has acted fairly or reasonably might be forced to evaluate the content of a public official's decision, applying specific criteria to ensure that the decision is fair (presumably with reference to fundamental human rights). Since Bingham's eight sub-rules are not to be read in isolation but are mutually reinforcing, it makes sense to turn our attention to the requirement associated with fundamental rights as that, presumably, informs all substantive evaluations that any other sub-rule could be read as incorporating.

Identifying historical examples of atrocities committed through legal systems, such as Nazi Germany or the Soviet Union, Bingham explains that

> 'a state which savagely represses or persecutes sections of its people cannot in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside is the subject of detailed laws duly enacted and scrupulously observed'.[214]

In this attack on conceptions to the rule of law that refuse to impose any restrictions on the law's content, Bingham suggests that it would be incomprehensible to speak of the rule of law as compatible with egregious violations of human rights. Although he does not provide a robust argument for his conviction, it appears that Bingham draws extensively from political history and **relies on widespread perceptions about how fundamental rights are a prerequisite to a democratic society that functions based on the rule of law**.[215]

3.2.2 Evaluating rule of law and human rights

Despite the popularity of linking the rule of law and human rights, this model contains certain shortcomings, which make it unfit for this project's aims. Even though respect for human rights and dignity, a key European value under Article 2, is deeply connected with a democratic society based on the rule of law, and as such will emerge as important elements in the various project outputs, they need not be included in the adopted model of the rule of law. In other words, **we may recognise that the rule of law and human rights are to be kept analytically separated (in a way that a violation of human rights will not necessarily amount to a violation of the rule of law), while also accepting that a goal of the**

[214] Ibid 67
[215] Ibid 69

European Union is to ensure that all citizens both within and outside the EU live under a rule of law regime *and* enjoy their individual rights.

A key objection related to linking human rights with the rule of law relates to the inherent ambiguity of human rights. There are deep-rooted disagreements when it comes to human rights.[216] Crucially, the disagreement is not limited to the periphery of human rights. It is not simply the case that the 'outer edges of some fundamental rights are not clear-cut'.[217] Instead those disagreements go to the heart of what some human rights entail. For example, even within western, liberal societies, which share, at least ostensibly, a common commitment to respecting human rights, there are deep conflict about moral issues: does, for example, the right to private life extend to the right of same-sex couple to adopt? And if it does, how does it fit with the existence of other rights (e.g., freedom of religion). Given the way in which different rights constantly clash and give weigh to one another, it would be implausible to hope for a coherent and stable model of the rule of law were we to introduce such conflict at the heart of the term.

Faced with this objection, proponents of rights-based approaches might argue that the conflict depicted earlier is exaggerated. Our societies have various mechanisms to balance different rights, none more pertinent that the courts. Judges, due to their expertise, training, and skill are suitably positioned to determine rights questions.[218] Yet, this rejoinder hardly dispenses the problem as it raises questions related to depoliticisation. In brief, depoliticisation refers to the tendency to refer specific matters to the courts, removing them from democratic assemblies.[219] Depoliticisation, then, augments the powers of the judges as a means of securing qualitatively superior outcomes. If judges are best suited to decide rights-issued, then, the claim from depoliticisation goes, we ought to entrust such issues to them. This practice engenders, however, critical concerns. First and foremost, one might doubt the

[216] See e.g., Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 2001)
[217] Bingham, *The Rule of Law* 74
[218] Bingham accepts, nevertheless, that disagreements may be pervasive, with judges often disagreeing whether specific actions amount to violations of certain rights, etc (ibid). By contrast, Dworkin (at least in earlier works) appears to minimise this concern defending the 'right answer thesis', maintaining that there exists a single correct answer that a judge can reach. See Dworkin, 'Hard Cases'
[219] Philip Pettit, 'Depoliticising Democracy' (2004) 17 Ratio Juris 52. There is extensive discussion on the merits/shortcomings of depoliticisation, Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004); John McCormick, *Machiavellian Democracy*. (CUP, 2011) 156

legitimacy of the courts as expert bodies.[220] Whereas parliaments and other popular assemblies derive legitimacy from their democratic character, which enables them to resolve questions on which there are reasonable disagreements, courts lack such legitimacy. As Tamanaha suggests, entrusting the courts with such responsibilities will only lead to the arbitrariness rule of law is supposed to combat. Given the indeterminacy of rights, he suggests, 'judges [could] consult their own subjective views to fill in the content of the rights, [and] the system would no longer be the rule of law, but the rule of the men or women who happen to be the judges'.[221] A key objection to rights-based approaches to the rule of law is that they place too much emphasis on courts in a way that ignores democratic legitimacy.[222] It is no accident that Bingham's eight sub-rules contain no reference to democracy. This is not to suggest the democracy and democratic principles remain unprotected, as core democratic principles, such as free speech or collective public campaigning, enjoy indirect protection through the established fundamental rights of freedom of expression and association. Thus, Bingham explains that media plurality and the ability to freely express one's views, are key rights that the rule of law incorporates.[223] But it remains the case that such protection is indirect and subject to the ordinary balancing exercises that protecting rights in different contexts entails.

Dworkin responds to this objection insisting that judges exercise no discretion but are simply the mouthpieces of the political community: they rely on moral values that have been developed and are supported by the political community.[224] This, he argues, gives their practice a democratic character.[225] Even if Dworkin's argument establishes that courts can work to defend and protect democratic values (when those are widespread in the political

[220] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 The Yale Law Journal 1346; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. (Cambridge: Cambridge University Press, 2007)
[221] Tamanaha, *On the Rule of Law* 105
[222] Waldron, 'Core Case Against Judicial Review'; Bellamy, *Political Constitutionalism;* Luc B. Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures' (2005) 3 International Journal of Constitutional Law 617; Jeremy Waldron, 'Judges as Moral Reasoners', (2009) 7 International Journal of Constitutional Law 2
[223] Bingham *The Rule of Law* 81
[224] Dworkin, 'Hard Cases'
[225] See Dworkin, "Political Judges and the Rule of Law."; Annabelle Lever, 'Democracy and Judicial Review: Are They Really Incompatible?' (2009) 7 Perspectives on Politics 805; Allan C. Hutchinson, 'The Rule of Law Revisited: Democracy and Courts' in David Dyzenhaus (ed) *Recrafting the Rule of Law* (Bloomsbury, 1999). By contrast, legal realists would completely reject that depiction of judges as unbiased, unprejudiced, and completely impartial arbiters, e.g., Brian Tamanaha 'Legal Realism in Context' in Elizabeth Mertz, Stewart Macaulay and Thomas W Mitchell (eds), *The New Legal Realism: Translating Law-and-Society for Today's Legal Practice*, (Vol.1, Cambridge University Press 2016)

community), the legitimacy concern remains.[226] Because their lack of democratic legitimacy (as courts are neither elected (normally), nor subject to public scrutiny), it would be untenable to suggest that depoliticisation raises no qualms about democratic legitimacy.[227]

To summarise, **there are conspicuous links between some fundamental rights and some components of the rule of law**. For example, Article 14 ECHR protecting against discrimination relates with the key rule of law principle that everyone is equal before the law. Similarly, Article 6 ensuring the right to a fair trial mirrors the key commitment of access to an independent and impartial judiciary so central to the rule of law. **But these connections do not necessarily mean that the rule of law encompasses protections for fundamental rights, nor that all violations of the rule of law are ipso facto violations of the rule of law.** Since most human rights are not absolute but have different weight depending on the specific circumstances, it would be counter-productive to incorporate them in a conception of the rule of law. By contrast, **a substantive conception of the rule of law that draws connections between it and democracy is better suited at capturing both the historical evolution of the rule of law, and avoiding the objections associated with human rights.**

3.3 Beyond thick and thin: Rule of Law and Democracy

This brief literature review has classified various approaches to the rule of law in two categories, thin and thick. But this hardly implies that all conceptions of the rule of law fall neatly into the two categories.[228] When it comes to analytic distinctions, the binary choice certainly makes sense. It can help distinguish between approaches that entail substantive restrictions on what laws will actually look like, compared to approaches the are only concerned with the format of the laws and not their content. But at the same time, there is much evidence to suggest that the thin/thick distinction is too rigid and unaccommodating of actual rule of law models. Tamanaha, for example, although working on the assumption that there can be a broad distinction between formal and substantive approaches to the rule of law, explains that there can be thinner and thicker conceptions falling along the spectrum.[229] For example, what he calls the 'formal legality' conception of the rule of law, which insists that laws maintain specific characteristics (that they are general, applying equally to everyone

[226] See for example Tamanaha *On the Rule of Law* 124-125
[227] See e.g., Andreas Marcou, 'Courts v. the will of the people: the judiciary, democracy, and the populist narrative' (2022) EU-POP JMMWP 3/2022 https://eupopulism.eu/working-paper-series-4/ accessed 24 August 2022
[228] Laurent Pech makes a similar point, Pech, 'Union Founded on the Rule of Law' 368
[229] Tamanaha *On the Rule of Law* 91

including the government, they are clear), is thicker than a blunt rule-by-law approach that simply requires that a common sovereign uses law to rule over their subjects. But it is also thinner from a conception that entails specific procedural requirements as well, typically associated with democracy.

To look beyond the thin and thick conception, however, would mean to recognise that, given the contestedness of many of the key ideas discussed within the context of the rule of law, some approaches might sit on the fence between formal and substantive theories. Take for example Tamanaha's example of democracy and legality, listed in the formal category.[230] The rule of law, according to this model, requires both that a democratic procedure is followed and that formal requirements as met. Because democracy is here portrayed in purely procedural terms—whatever the people consent to—imposing no requirements on the content of the laws, this approach resembles formal models. But approaches to democracy vary.[231] A procedural model of democracy requires that decisions should flow from established majoritarian practices, either carried out by elected representatives or by the entire populace. Outcomes will be democratic regardless of their content.[232] By contrast, a substantive model of democracy stresses the importance of specific outputs. Or to be more precise, a substantive model of democracy prevents certain outputs, namely those that undermine democratic structures and norms.[233] For example, an outcome that makes voting in elections more difficult for a class of citizens is undemocratic regardless of the procedures taken to reach it.[234]

As a result, a 'democracy and legality' approach may just as easily give rise to substantive limitations. On an expanded model, for example, the democratic procedure must

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[230] Ibid, Tamanaha. On an interpretation of democracy and the rule of law as a substantive model see Robert Summers, 'A Formal Theory of the Rule of Law' (1993) 6 Ratio Juris 127, 135

[231] See e.g., David Held, *Models of democracy* (3rd ed., Stanford, California: Stanford University Press, 2006); David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2008); Maria Paula Saffron and Nadia Urbinati 'Procedural Democracy, the Bulwark of Equal Liberty' (2013) 41 Political Theory 441

[232] E.g., Saffron and Urbinati, 'Procedural Democracy'

[233] Models of deliberative democracy emphasising consensus would fall under this category of outcome-based democracy, see e.g., Jurgen Habermas, *Between Facts and Norms* (Boston: MIT Press, 1996) 150, 158; Seyla Benhabib (ed.), *Democracy and Difference* (Princeton: Princeton University Press, 1996) 69. Cf. Bellamy, *Political Constitutionalism* 150. For an analogous discussion on legitimacy see Peter Fabienne 'Political Legitimacy' The Stanford Encyclopedia of Philosophy (2017) https://plato.stanford.edu/archives/sum2017/entries/legitimacy/ accessed 10 August 2022

[234] This is not to render judgment on the measure's legality, legitimacy, or desirability as there might be other good reasons to accept that outcome (e.g., this is a temporary measure that is absolutely necessary in order to achieve some other public good, such as public health).

maintain at least *some* substantive limitations, if it is to continue being a democratic procedure. Laws resulting from a model of the rule of law that adheres to the democracy-legality conditions, for example, cannot take away the right of people to participate in democratic processes, as this would destroy the democratic procedure itself. If this is a substantive limitation on the content of the laws open for adoption, then this conception of the rule of law can easily be interpreted as a substantive theory. Just as democracy oscillates from the procedural to the substantive model, so will the rule of law conception adopted when combined with it. The proposed model of the rule of law, and the one that will be employed for this project sees the rule of law as encompassing inherent connections with democratic rule. **In summary, a system of the rule of law encompasses formal requirements (that laws are general, public, non-retroactive, etc.), procedural requirements (that laws emanate from democratic procedures) and substantive requirements (no law can violate key democratic principles, such as participation in law-making, or the ability to challenge, contest, and otherwise criticise decisions**.[235] Given the expanded model of democracy advocated, this list of democratic principles is non-exhaustive.

One further point of clarification is warranted at this stage. Ordinary political discourse often speaks in absolutes, rejecting this or that regime as undemocratic, illegitimate, against the rule of law, etc. But determining a system's legitimacy or adherence to the rule of law or democracy is hardly an all-or-nothing evaluation, but rather a question of degree.[236] Throughout the project, **we shall adopt a gradual approach to the rule of law**. Regimes around the world today fall along the spectrum of the rule of law with some achieving greater protections of the rule of law than others. Existing frameworks and indices that measure the rule of law tend to recognise this. By ranking systems and comparing their rule of law grades, they accept that adherence to the rule of law is a matter of degree. The greatest difficulty with ranking legal systems rests, unsurprisingly, on the inability to first determine how to conceptualise the rule of law, and second, on which indicators accurately depict adherence to

[235] For some defence on the connection between democracy and the rule of law see Jean Hampton, 'Democracy and the Rule of Law' in Ian Shapiro (ed.), *The Rule of Law* (New York: NYU Press 1994). This section reaches similar conclusions albeit via a different route, adopting a republican approach rooted in Aristotle.
[236] Fuller, *Morality of Law* 122; Eric Heinze, *Hate Speech and Democratic Citizenship* (OUP, 2016) 44, 87

a rule of law account once conceptualised.[237] This section is thus divided into two parts. The first lays out the theoretical foundation of the rule of law and democracy model. The second proceeds to identify various themes that are covered under this conception of the rule of law. **These themes will provide our need of a normative framework against which future activities will take place.**

3.3.1 Aristotle, the rule of law, and checking political power

Aristotle famously proposes the first systematic approach to the question of the rule of law. While evaluating existing constitutional arrangements, Aristotle concludes that constitutions tend to be either subject to the rule of human beings or the rule of law.[238] To be clear, Aristotle recognises that in any political system, it is, in the end, human beings that make decisions. Yet he rightly insists on the qualitative difference between constitutions where decisions made by human beings are ultimately authorised by clear and settled laws, and those where rulers dispense power at whim.

Plato might have feared that a law's general application and inattention to the specifics of each case was not a match for the careful and detailed ad-hoc treatment that skilled rulers could apply.[239] But Aristotle immensely worries about placing such discretionary power at the hands of individuals.[240] There is inherent instability in entrusting the law of human beings: when rulers are benevolent, intelligent, and skilful, the outcome is beneficial to the community. But when they are incompetent, self-interested, or stupid, the results are disastrous. No matter how skilled, well-trained, or well-groomed, the danger always remains that individuals may abuse their powers. By contrast, regulating the exercise of power through laws becomes the greatest guarantee for justice. Whereas asking human beings to rule is "like asking a wild beast" to rule, the law resembles instead the rule of "God and the understanding".[241] Against the irrationality of discretionary power, the rule of law guarantees rationality. Against the arbitrariness and whimsicality of the rule of human beings, the rule of law promises organisation and harmony.[242] In a community permeated by principles of the

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[237] See e.g., Andras Jakab and Lando Kirchmair 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 German Law Journal 936
[238] *Politics* 1281a33-35
[239] Hence Plato's faith in the enlightened philosopher rulers. Aristotle recognises that individuals might reason better about the particular *Politics* 1286a21-25
[240] E.g., *Politics* 1272a35-37
[241] *Politics* 1287a28-30
[242] *Politics* 1287a18

rule of law, political power is structured, and its outcomes are consistent with reason.[243] The rule of law is the ultimate bulwark against the irrationality and arbitrariness of rule by human beings that is unchecked by laws.[244]

For Aristotle, entrusting the law to rule amounts to a bulwark against the haphazard use of political power. This approach anticipates many of the different models of the rule of law through the centuries. One might then wonder how this model of the rule of law relates to democratic governance. Having distinguished between systems ruled by human beings and those regulated by the law, Aristotle also distinguishes between the rule of the many and the rule of the few.[245] Although this second distinction does not mirror the first (Aristotle recognises the possibility of having a monarchy that operates under the rule of law), there is much to suggest that the rule of the many is tightly associated with the rule of law. Even though there has historically been much scepticism about the 'wisdom of the crowd', Aristotle applauds the multitude's ability to reach decisions superior in justice to even the few experts.[246] Pooling their resources, the many are able to reach superior decisions—like a feast that becomes better when many contribute, a decision is more likely to reflect reason when it encompasses the various viewpoints and opinions of participants.[247] Distancing himself from the Platonic idea of philosopher rulers uniquely positioned to reach reason, Aristotle insists that it is the collective deliberation of the many that can produce the most reasoned outcomes.[248]

What becomes more important for our purposes, however, is that a collective government that successfully produces justice is impossible without the rule of law. Even if the rule of the many is superior to the rule of the few, the many cannot all rule at once. Such rule is chaotic, counter-productive, and unlikely to adhere to reason. Rejecting unmediated direct democracy, Aristotle proposes a democratic model of governance consisting of rotationary rule. Because all participants are fundamentally equal, they ought to share in political rule by ruling and

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[243] *Politics* 1287a18-1287b7
[244] The idea that law is the mean (*Politics* 1287b3) reinforces its connection with reason
[245] *Politics* 1281a38-39; 1286a31-36
[246] *Politics* 1281a41-1281b38
[247] This position has inspired deliberative democrats, see James Bohman, 'The Coming of Age of Deliberative Democracy' (1998), 6 *The Journal of Political Philosophy*, 400-425; Joshua Cohen,'Deliberation and Democratic Legitimacy' in James Bohman, & William Rehg (eds.), *Deliberative Democracy* (The MIT Press, 1997) 67-92; John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations*. (OUP, 2010). See also impact on J.S.Mill's 'marketplace of ideas' in J.S. Mill, *On Liberty and Other Essays* (John Gray, (ed), Oxford: Oxford University Press, 2008)
[248] *Politics* 1281a41-1281b38

being ruled in turn.[249] But this arrangement presupposes a specific framework: who rules at which time? For how long? How does power transition from one group of rulers to the next? How can one ensure that this arrangement is entrenched? Unsurprisingly, the rule of law resolves these issues. The very organisation on which the collective government model functions requires law to rule.[250] In other words, and to use contemporary language, **a model of shared democratic government presupposes the existence of a constitutional arrangement that regulates that sharing of political power.** Principles of checks and balances between different branches that have long been deemed key rule of law features[251] emanate from the Aristotelian belief that collective government under the law is the constitution most suitable to produce justice.[252]

It would be naïve to however suggest that democracies are ipso facto constitutions of the rule of law. Aware that some types of democracy are prone to abusive behaviour, Aristotle distinguishes between different models of democracy.[253] On the one hand, some democracies operate without the rule of law. These systems embody some aspect of democratic government, namely the majoritarian requirement that decisions are approved by more than half of the participants, while eschewing others. On such systems, the unmediated, unquestioned, and unconstrained will of the majority rules.[254] Nothing is off limits in such a system. Should the democracy decide, without any justification or rationale, to redistribute wealth, no obstacles exist to stop it.[255] Anticipating Alexis de Tocqueville's warning about the 'tyranny of the majority', Aristotle suggests that such democracy resembles from tyranny.[256] By contrast, democracies that encompass the majoritarian component while adding constraints set by law are to be desired for their superiority in producing justice.[257]

Two observations need to be made at this stage: first, the rule of law emerges, according to the Aristotelian model, as a *necessary* component of a 'good' democracy. Second, the reason that the rule of law is a necessary component of a democracy is that it embodies a

[249] *Politics* 1277a25-26; 1287a15-17
[250] *Politics* 1287a18
[251] See e.g., Montesquieu *Spirit of Laws*
[252] Aristotle argues that there are three functions that ought to exist in every polis: the part that deliberates (legislative); the part that has to do with the offices (executive); and the part that decides lawsuits (judiciary) (*Politics* 1297b40-1298a2).
[253] *Politics* 12191b30-1292a37
[254] *Politics* 1292a4-1292a18
[255] *Politics* 1281a17-24
[256] *Politics* 1292a17
[257] *Politics* 1291b30-1292a1. Aristotle's preferred system is a mixed constitution combining elements of democracy and oligarchy under the law *Politics* 1293b31-1294a6

fundamentally *anti-majoritarian* character. It is its function to keep in check majoritarianism that makes the rule of law a vital element of democratic systems.[258] When the Federalists warn of the threat that democratic impulses resemble, what they have a mind is a specific type of majoritarian government that is unconstrained by any legal limits. Indeed, Madison explicitly laments the propensity that a direct democracy has to turbulence and contention, assuring the readers of its incompatibility with 'personal security or the rights of property'.[259] There is no doubt that such a system is a threat to individual freedom and is an instance of tyranny. Alexis De Tocqueville's work places a premium on the salience of limiting the destructive and corrosive effects of tyrannical democracies.[260] This discussion may also explain why some populist leaders in Europe today attack key components of the rule of law (e.g., judicial independence) protesting their (supposedly) anti-democratic character. Those who make such arguments misconstrue the rule of law as an anti-democratic device instead of an anti-majoritarian mechanism because of their manipulative conflation of democracy with sheer majoritarianism.

The rule of law emerges as the greatest check on political power a society might maintain.[261] And when political power is monopolised by a group of agents, as is the case in contemporary democracies with representatives often entrenching themselves in positions of political power, limitation of their power warrants a turn to democratic accountability and checks and balances. For example, when a group of decision-makers enact a law that, say, removes a previous existing requirement of public disclosure of their private wealth, such action is not only an affront to democracy (to the extent that it limits the public's ability to hold their representatives accountable) but it is also, at heart, a rule of law violation because the measure entails the removal on checks on the exercise of political power.

Some rule of law theorists have resisted the connection between the rule of law and democracy. For Unger, "the mere commitments to generality and autonomy in law and to the distinction among legislation, administration and adjudication have no inherent democratic significance."[262] Other theorists, Tamanaha notes, insist that the relationship between

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[258] See also, for example, Hutchinson and Monahan, *The Rule of Law* 100
[259] Alexander Hamilton, James Madison, John Jay, [1755-1804; 1751-1836; 1745-1829] *The Federalist: With Letters of Brutus*. (CUP, B. Terence (ed) 2003), No.10
[260] Alexis de Tocqueville, [1805-1859] *Democracy in America* (Mansfield, H. C., & Winthrop, D. (eds and trans), Chicago: University of Chicago Press, 2002)
[261] Richard Bellamy, 'The rule of law' in Richard Bellamy & Anthony Mason (eds.), Political Concepts (Manchester University Press, 2003) 119-121
[262] Roberto Unger, *Law In Modern Society*, (Free Press, 1976) 191

democracy and the rule of law is asymmetrical: the former presupposes the latter but not vice versa.[263] Even if formalists are willing to accept the observation that a proper democracy can in no way exist without a rule of law system in place, they resist the inverse arguing, as Raz does, that a "nondemocratic legal system . . . may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies."[264] But this conclusion only obtains on the basis of specific conceptions of the rule of law and democracy. For example, properly enacted decisions that undermine democratic norms will, on a thicker account of the rule of law, be incompatible with democracy *and* incompatible with the rule of law. Consider the case of a Parliament deciding, through its normal law-making procedures, that free speech ought to be restricted when criticising the government. On a thin account of the rule of law, there is little undermining the rule of law in this case. All the processes are followed, there is nothing explicitly wrong with its formal characteristics, and nothing (explicitly) violating judicial independence. On a thick approach to the rule of law, however, this law is objectionable both as a violation of democracy and as an affront to the rule of law. It undermines a key democratic component (free speech and dissent) and therefore violates the entire rule of law structure. Taking away democratic powers, it invariably enhances the unchecked and arbitrary use of power by some political agents. On a thick model of the rule of law proposed here, the relationship between the rule of law and democracy is symbiotic, not parasitic. **Just as democracy cannot exist without a minimum level of the rule of law, the rule of law cannot survive without some minimum level of democratic government.**

3.3.2 From conceptualising to measuring: Themes and scope of the proposed model

In the previous section, we suggested that the rule of law should encompass substantive protections for democratic governance in addition to formal and procedural guarantees. Much then comes down to how broadly one construes democracy. On a broad model of democracy, one that moves beyond institutionalised methods of democratic decision-making (e.g., voting in elections), many other, non-institutional activities relate to democracy. That would include criticising and contesting the decisions democratic assemblies reach, participating in civil society, engaging in local government, holding political power to account by engaging in dissent, both institutional (lawful demonstrating, petitioning) and extra-institutional (e.g.,

[263] Tamanaha *On the Rule of Law* 37
[264] Raz, 'The Rule of Law and Its Virtue' 2011

civil disobedience, conscientious objection).[265] A rule of law model that takes democratic requirements seriously will therefore extend its protections to all activities that facilitate individual citizens' political engagement.

The conception of the rule of law adopted in this section serves two purposes. *First*, it seeks to emphasise that to use the rule of law as an instrument of legitimation, which is how the rule of law is generally conceived today, one must move beyond thin models that fail to encompass any substantive requirement about the law's content. In other words, a model that is to be widely used cannot accept that some accounts of the rule of law could, potentially, accommodate dictatorial systems that simply adhere to formal requirements for the creation of laws. *Second*, the approach adopted reflects, at least to some extent, the history of the term and its commitment to providing a bulwark against the arbitrary use of political power. As this section has indicated, the proposed concept accentuates links between democracy and the rule of law that have existed for centuries.

Adopting this model of the rule of law has implications on how we can talk, analyse, and eventually measure the rule of law. In this last part of the section, we shall explore some themes that emerge from the democratic model of the rule of law. **If the rule of law amounts to a mechanism for the control of the use of political power, and if the rule of law entails specific democratic commitments that are necessary for exercising such control, then the following themes are directly connected with the rule of law.** This is not to suggest that other models of the rule of law, including some thinner models, cannot also express concern for the following.

3.3.2.1 Corruption and Accountability

Corruption is a key concern bedevilling contemporary democratic systems.[266] A core tenet of democracy is that the exercise of political power should benefit everyone. All laws and political decisions should be geared towards the common good. When, however, power-holders take decisions that further sectional interests over the common good,

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[265] There is much support for expansive models of democracy in the literature. Benjamin Barber, *Strong Democracy* (University of California Press, 2003); Jane Mansbridge, *Beyond Adversarial Democracy* (Chicago: University of Chicago Press, 1983); Carole Pateman, *Participation and Democratic Theory* (CUP, 1970); Heinze, *Hate Speech*. On extra-institutional mechanisms of dissent and democracy in particular see Robin Celikates, 'Rethinking Civil Disobedience as a Practice of Contestation—Beyond the Liberal Paradigm' (2016) 23 Constellations, 37; Andreas Marcou, 'Obedience and Disobedience in Plato's Crito and the Apology' (2020) 25 Journal of Ethics 339

[266] Bartels, *Unequal Democracy: The Political Economy of the New Gilded Age* (New York: Sage, 2008)

corruption takes root.[267] It is beyond the scope of this paper to analyse corruption, its causes or effect on the political community.[268] Suffices to note, however, that corruption is a classic breach of the rule of law and democratic principles. First, by taking action for private benefit rather than for the common good, power-holders abuse their law-delegated powers. In a sense, they act beyond the powers given to them by law. Second, their activity violates key democratic tenets of political equality. Whereas laws and decisions are meant to benefit everyone, corruption results in the unfair distribution of benefits.

Corruption tends to fester when there is lack of accountability and transparency. To combat corruption, legal systems should institution procedures that ensure accountability. This might be by subjecting public decisions to review by judicial bodies.[269] Or it might be by opening avenues to the public to engaging in similar scrutiny practices. The power of the public to request information on such things as public spending (typically through Freedom of Information Acts) amounts to a powerful tool to stifle corruption.[270] Such measures enhance transparency and accountability and enable the detection and exposure of corrupt practices.[271] **A system adhering to the rule of law, committed to tackling corruption, will therefore ensure the existence of effective means of accountability and transparency.**

Discussion on corruption, accountability, and transparency raises a further key issue that directly relates with the rule of law. An effective system of accountability and transparency is necessarily built on strong institutions that either carry out these tasks of check and review themselves, or open up avenues for other bodies (or even individuals) to report, detect, and prevent corrupt practices. Such a framework's success is predicated **on public trust in anti-corruption institutions, which in turn often links to the overall trust citizens have**

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[267] Ibid. See also Iseult Honohan, *Civic Republicanism* (New York: Routledge, 2003) 220-221 (on how representation may oppress minorities)
[268] See e.g., Dennis Thompson, 'Two concepts of corruption: making elecotral campaigns safe for democracy' (2005) 73 George Washington Law Review 1036
[269] But see SW Howe and Yvonne Haigh 'Anti-Corruption Watchdog Accountability: The Limitations of Judicial Review's Ability to Guard the Guardians', (2016) 75 Australian Journal of Public Administration 305.
[270] Mária Žuffová, 'Do FOI laws and open government data deliver as anti-corruption policies? Evidence from a cross-country study', (2020) 37 Government Information Quarterly; Samia Costa, 'Do Freedom of Information Laws Decrease Corruption?' (2013) 29 Journal of Law, Economics, & Organization, 1317; Adriana Cordis and Patrick Warren, 'Sunshine as disinfectant: The effect of state Freedom of Information Act laws on public corruption', (2014) 115 Journal of Public Economics 18
[271] Transparency International, Right to Information: A Tool For People Power https://www.transparency.org/en/news/right-to-information-people-power access 24 August 2022

for their legal systems.[272] We have already seen how a state's rule of law record relates to its legitimacy. Importantly, it also relates to perceptions of its legitimacy. A society in which the citizenry maintains a belief that corruption is widespread, and the existing accountability and transparency mechanisms are ineffective will ultimately fail to rein in corruption even it manages to install a perfect institutional framework to manage it. **Public perceptions are therefore crucial to the effectiveness of anti-corruption activities.**

3.3.2.2 Judicial Review

The citizens' ability to contest and review executive (or even democratic) decisions is a key component of a system of judicial review.[273] It is also, arguably, an avenue for citizens to participate in politics. For Pettit, the ability to contest a government's actions is the quintessential element of contemporary democracies.[274] We have previously identified some key democratic concerns associated with entrusting courts with extensive powers.[275] We do not intend to engage with the judicial review debate, but it remains the case that the opportunities citizens have to engage in judicial review, and importantly the public perceptions about the realistic prospects of engaging in judicial review and succeed, are a salient issue associated with the rule of law. **It is no accident that components such as judicial independence, access to courts, and the ability to achieve effective legal remedies are common in all rule of law models identified and discussed in this section.**

3.3.2.3 Free speech and dissent

As we discussed earlier, the expanded model of democracy on which we base our model of the rule of law advocates enhanced access to political procedures, not limited to access to periodic elections for representatives**. Free speech and the related ability to openly**

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[272] There are various studies in different countries. Indicatively, see Bianca Clausen, et al. 'Corruption and Confidence in Public Institutions: Evidence from a Global Survey' (2011) 25 The World Bank Economic Review, 212 accessed 24 August 2022. Also Jonathan Perry, 'Trust in public institutions: Trends and implications for economic security' UN Department of Economic and Social Affairs https://www.un.org/development/desa/dspd/2021/07/trust-public-institutions/ accessed 24 August 2022

[273] Note that for Aristotle one of the two minimum conditions for the existence of democracy is that the power of inspection of officials rests with the people. The second is participation in elections. *Politics* 12374a15-17

[274] Pettit, *Republicanism*; Pettit, *On the People's Terms* 2012

[275] Waldron, 'Core Case Against Judicial Review'; Bellamy *Political Constitutionalism*. But see also John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980) 4-5; Samuel Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 Law and Philosophy 327; Richard Fallon, 'The Core of An Uneasy case for Judicial Review' (2008) 121 Harvard Law Review 1693

criticise government actions and inactions emerges as the cornerstone of this model of democracy. For Jurgen Habermas, the existence of a forum where public discourse takes place is an irreplaceable element of a democratic system.[276] The importance of free speech for a democratic society can hardly be overstated. For Heinze, the ability to speak freely is the ultimate legitimating condition for a democratic system.[277] The litmus test of a democratic society, to paraphrase Habermas seminal essay on civil disobedience, is how it approaches dissent.[278] Any actions that seek to stifle dissent are in principle antithetical to democratic norms and erode the rule of law.[279] Dissent is not simply a right that democratic citizens deserve, but it is crucially an ingredient that contributes to the checking of political power. It can take a variety of forms, from lawful demonstration to petitioning, and from public speech to civil disobedience. But in all cases, to *dissent* is to indicate one's disagreement with a political decision, to invite dialogue on its true impact, to call on fellow citizens to pay attention to an issue and, ultimately, to impose checks on decision-makers, forcing them to justify their actions.

3.4 Conceptualisation of the rule of law within the EU

In light of the preceding discussion on the different approaches to the rule of law, let us now turn to how the rule of law is used by the European Union and its institutions. From the outset, it is important to note that the Treaties contain no indication as to the definition of the rule of law. Article 2 does not identify any of the key values listed, nor does it provide for a hierarchy. Nowhere in the Treaties can one find a formula to determine trade-offs between those different values, even if one might naturally expect that protecting one value could warrant sacrificing some element of another (for example, ensuring some fundamental rights might require the restriction of some democratic measures). For Magen, despite the lack of a hierarchy, the rule of law still maintains a certain 'primus-inter-pares' quality among Article 2 values.[280] A similar approach is implied in the text of the Regulation, which sees the rule of law as essential for all other values.[281] Although such priority remains unsupported by the text

[276] Habermas, *Between Facts and Norms*; Heinze, *Hate Speech*
[277] Heinze, *Hate Speech*
[278] Jurgen Habermas, 'Civil Disobedience: Litmus Test for the Democratic Constitutional State' (1985) 30 Berkeley Journal of Sociology 95
[279] For the importance of dissent see Cass Sunstein, *Why Societies Need Dissent* (Harvard University Press, 2003)
[280] Amichai Magen, 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' (2016) 54 JCMS 1050
[281] Regulation 2020/2092 on a general regime of conditionality for the protection of the Union Budget (2020) OJ L 433I, Para 6

of the Treaties, the proposition is plausible considering that the existence of a general legal framework built on the rule of law is a prerequisite for the creation of a stable society where other values can be effectively protected and guaranteed. Even though, as we shall see, the Court of Justice (ECJ) has decided on issues related to the rule of law, it has been conspicuously ambivalent about the scope and the extent of the concept. This is understandable considering the complex picture depicted earlier and the inevitable disagreements about what the rule of law would entail. But it is worth exploring first, how the rule of law manifests within the EU framework and second, what kind of approaches to the rule of law different EU institutions have adopted.

3.4.1 The Rule of Law and the Broader EU Framework

When we think of the rule of law at the European level, a variety of perspectives emerge.[282] First, one might argue that the centrality of the ECJ and its ability to review and scrutinise the actions and decisions of other EU institutions embodies the rule of law at the European level.[283] The principle of conferral, a tenet of the EU constitutional structure, provides that all power exercised by EU institutions is conferred by the Treaties, the key legal documents of the Union. A key task of the ECJ, as the final arbiter of EU law, is to ensure that all actions are subject to the limits imposed by the treaties. Regardless of the institution in question, all decisions must flow from law. In that sense, the rule of law is a core element of the European structure.[284]

Second, the rule of law typically describes the ways in which power is organized in a community. The EU is a complex structure of different sovereign states, comprising a unique legal order. But because it comprises various sovereign states, the sheer existence of the EU is predicated on the constant interplay between national law of member states and law created at the European level. Since the landmark cases of *Costa v ENEL* and *Van Gend en Loos*, the principle of supremacy of EU law dictates the relationship between European and domestic law. But this constitutional principle also raises rule of law questions. If the rule of law requires obedience to higher norms, then MS who disobey EU law, flouting its supremacy

[282] The following list builds on similar accounts found in Roberto Baratta 'Rule of Law Dialogues within the EU: A legal assessment' (2016) 8 Hague Journal on the Rule of Law 357. See also Monica Claes and Matteo Bonelli. 'The Rule of Law and the Constitutionalisation of the European Union' in Schroeder (ed) Strengthening the Rule of Law in Europe: From a Common Concept to Mechanisms of Implementation, (Oxford: Hart Publishing, 2016)
[283] See e.g., Pech, 'A Union Based on the Rule of Law'
[284] Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395

act, ipso facto, against the rule of law. This account of the rule of law identifies the political ideal with legal obedience: in a hierarchical system of law, the rule of law entails the observation of that hierarchy. When the EU, then, insists on the importance of adhering to legality, seeking to enforce the compliance of recalcitrant states, it pursues one aspect of the rule of law--legality. On this second interpretation, there is no assessment of the ways in which the EU *itself* adheres to the rule of law. This interpretation simply stresses obedience to law (and to key constitutional provisions) as an element of the rule of law.[285]

Third, as a value included in Article 2, the rule of law is deemed a common value that all MS share. As such, discussions at the European level often revolve around whether MS successfully and effectively safeguard the rule of law and other European values in their domestic affairs. This third way of analysing the rule of law harkens back to a question already discussed, specifically the tools at the Union's disposal to ensure that the rule of law and its other values are enforced in Member States.

Fourth, as Baratta stresses, the rule of law also has an external dimension. This means that the promotion of the rule of law beyond the EU is a target for the Union. Although this fourth aim does not take on much space in this report, it is one goal that CRoLEV seeks to realise. Through cooperation with partner institutions outside the EU, the Centre will contribute to the promotion of key European values elsewhere.

3.4.2 A fractured Rule of Law

Again, no EU document provides a definition of the rule of law (or any other European value). This has inevitably led to the adoption of different interpretation by different institutions. For Smith, this has resulted in a fracturing of the rule of law, which has made its protection and enforcement more difficult.[286] There is a rich literature on the nature of the rule of law at the European Union and on the various ways in which different institutions approach the issue. For example, Konstantinides maintains that the EU generally opts for a thin conception of the rule of law with emphasis primarily placed on the application and enforcement of laws.[287] By contrast, Pech insists that the EU maintains a thicker conception of the rule of law. Article 7 talks about violations of values, taking them all together, which,

[285] On this and the first interpretation see Melanie Smith, 'Staring into the Abyss: A crisis of the Rule of Law in the EU' (2019) 25 European Law Journal 561, 566
[286] Amichai Magen 'The rule of law and its promotion abroad: three problems of scope'. (2009) 45 Stanford J Int Law 51
[287] Theodore Konstadinides, *The Rule of Law in the European Union: The Internal Dimension* (Oxford: Hart Publishing 2017)

for Pech, suggests that those values are interdependent. As such, the rule of law is not simply seen in thin terms.[288] For present purposes, we shall briefly outline the way in which two key institutions, the European Commission and the ECJ, approach the rule of law, while also evaluating one of the latest pieces of legislation that deal with the concept, namely the Conditionality Regulation.

Notwithstanding how the Commission has used its powers to safeguard the rule of law, the approach to the rule of law it proposes is very broad as it incorporates other values such as respect for fundamental rights, democracy, and pluralism. Drawing from the case law of the ECJ and the European Court of Human Rights, and from documents drafted by the Venice Commission, the Commission identifies a non-exhaustive list of principle that it deems central to the rule of law. These, found in its 2014 Communication on 'A new EU Framework to strengthen the Rule of Law', include: legality, which includes transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.[289] Yet evaluating the Commission's seemingly thick conception of the rule of law warrants caution. For example, unconcerned with questions of justiciability, the Commission remains vague as to specific violations that would undermine the rule of law. In addition, looking at the Commission's subsequent work in the area, and in particular the Annual Rule of Law Report, one observes the broad and open account of the Communication giving way to a thinner conception that includes no specific components measuring respect for human rights overall, focusing instead on what are elements associated with thin models (e.g., procedural aspects of the rule of law, independence of courts). Given the Commission's political role, it is unsurprising that its approach the rule of law is neither analytically robust, nor consistent—different actions would require the adoption of varying rule of law standards. It is also worth pointing out that the European Parliament has consistently adopted broad conceptions of the rule of law, seeing it intrinsically connected to democratic values, the rule of law, and substantive equality.[290]

A crucial distinction to be made at this stage is that between the rule of law and *a* rule of law. A rule of law refers to any instrument issued by a law-making authority. Rules prohibiting

[288] Pech, 'Union Based on the Rule of Law' 368
[289] Communication From the Commission To The European Parliament And The Council, A new EU Framework to strengthen the Rule of Law Brussels, 11.3.2014 COM (2014) 158
[290] See for example text accompanying note 70.

theft and rules enabling one to draft a will are rules of the legal system. Rules of law are justiciable—the relevant judicial body is able to resolve disputes related to the rule, interpret it, enforce it, and perhaps even strike it down. By contrast, the rule of law is a political ideal. It does not refer to a specific rule of the legal system (although it might refer to the conditions that *all* rules of the legal system must meet), but rather to the legal system in general. The rule of law is therefore difficult to become justiciable. As a result, one way to ensure the concept's justiciability would be to break it up into distinct components, which could then become the subject matter of a court case. Consider the way in which the ECJ has rendered judgments on the rule of law. To enforce and protect the rule of law, the Court inadvertently focused on some specific components. In the seminal Les Verts case, the Court emphasized effective judicial protection as a core rule of law component, resisting an overarching definition. An analysis of the Court's subsequent jurisprudence regarding the rule of law reveals an almost exclusive emphasis on judicial independence and the related availability of effective judicial remedies as key rule of law components.[291] This strategy is sensible. Judicial independence, virtually a common characteristic of thin and thick approaches, is far easier to adjudicate compared to other components (e.g., human rights, democracy).

One might suggest that the Court's preoccupation with judicial independence and judicial remedies confirms that the ECJ adopts a thin conception of the rule of law. Yet for various commentators, this is inaccurate.[292] Pech vehemently rejects such suggestions noting instead Court's use of the concept as an umbrella term encompassing formal and substantive components. Seeing judicial review as a key element of the rule of law, Pech suggests, betrays a deep-rooted commitment to fundamental rights and the ability of individuals to secure them.[293] He summarises this position as follows:

'…the Court essentially equates the rule of law, as a constitutional principle, not with a particular set of requirements about the form of legal rules, but with judicial review (as it gives effect to the rule of law) and judicial protection of individual rights and in particular,

[291] For a full analysis see Laurent Pech and Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A casebook Overview of Key Judgments since the Portuguese Judges Case,* (Sieps, 2022)

[292] E.g., Thomas von Danwitz, 'The Rule of Law in the Recent Jurisprudence of the ECJ' (2014) 37 Fordham Journal of International Law 1311.

[293] Pech, 'Union Based on the Rule of Law' 373. See Case C-50/00 P *UPA* [2002] *ECR* I-6677, paras. 38-39. See also Koen Lenaerts and Tim Corthaut, 'Judicial Review as a Contribution to the Development of European Constitutionalism', in Takis Tridimas and Paolisa Nebbia (eds.) *European Union Law for the Twenty-First Century*, (Oxford, Hart Publishing 2004); Jean Victor Louis, 'The Rule of Law', in Martin Westlake (ed.) *The European Union beyond Amsterdam* (London, Routledge 1998), 112. See also Opinion of AG Jacobs in Case C-50/00 P *UPA* [2002] *ECR* I-6677

the individual's fundamental rights (a key component as well as objective of the rule of law).'[294]

Even if one remains sceptical about Pech's suggestion that the commitment to judicial review resembles a commitment to fundamental rights that represents a thick model of the rule of law, his argument certainly reinforces the point that the distinctions between thin and thick approaches to the rule of law are difficult to pinpoint with certainty (even on conceptions of the rule of law that, at first blush, appear thin, substantive values might inadvertently creep in). The Court's approach to the rule of law question, however, better identifies with thin conceptions due to the emphasis on the courts (their independence, their ability to deliver judicial remedies, etc.). Such emphasis might of course be for pragmatic reasons. Perhaps, considering widespread attacks on judicial independence in Poland and Hungary, the ECJ has risen up to the challenge of protecting the rule of law by adopting a more targeted approach (for which it could find some support in the Treaties, in Article 19 TEU) that would eschew substantive elements that would perhaps have been less justiciable.[295]

The latest statutory instrument to grapple with questions of the rule of law is the Conditionality Mechanism. The text of the regulation exemplifies the ambivalent approach to the rule of law at the European level. First, there are clear suggestions that the regulation opts for a thick conception of the rule of law.

> 'The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of *democracy* and the *respect for fundamental rights* as stipulated in the Charter of Fundamental Rights of the European Union (the 'Charter') and other applicable instruments, and under the control of independent and impartial courts.'[296]

Reinforcing this belief, the Regulation goes a step further arguing that the relationship between the rule of law, fundamental rights, and democracy is reciprocal.[297] This claim all but guarantees a thick model of the rule of law.

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[294] Pech, 'Union Based on the Rule of Law' 380
[295] Dimitry Kochenov and Petra Bárd, 'The Last Soldier Standing?: Courts vs Politicians and the Rule of Law Crisis in the New Member States of the European Union', (2020) 1 European Yearbook of Constitutional Law 243
[296] Reg 2020/2092, Conditionality Protection of Union Budget, para 3
[297] Ibid, para 6 'There can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa'

Yet despite these initial observations, the main text of the regulation paints a different picture. Article 3, which lists indicative breaches of the rule of law, is clearly focused on breaches associated with the courts. All breaches potentially justifying the application of the conditionality mechanism are related to an independent judiciary, attempts to limit the court's power to hold governmental power to account, and the availability of legal remedies. Even if this is simply an indicative list, it becomes clear that the primary focus of the mechanism is the independence of the judiciary. The fact that the regulation offers two varying approaches to the rule of law within its texts is indicative of the fractured nature of the concept at the European level.

4 Measuring aspects of the Rule of Law

The concept of measuring the quality of governance and level of the rule of law has gained increased attention in the last two decades,[298] although it is hardly something new especially in the private sector, beyond the legal field. In fact, since the early 1970s, private firms have compiled governance indicators to provide business decision makers with tools, with the objective of assessing risk.[299] On the other hand, legal indicators were first used to measure the results of legal rules such as the economic growth and the reduction of poverty. Following the lessons learned from the use of indicators in the instrumental view of law (law as an instrument in development), it became clear **that indicators could also be a useful platform to measure the rule of law as a value, regardless of its direct impact on other variables of development, such as the economy.**[300] A new view therefore emerged, that legal institutions are parts of development in themselves. The interest in monitoring and measuring the rule of law in the EU Member States was increased in the early 2010s and especially since the resolution of the European Parliament of 10 June 2015 on the situation in Hungary, where the Parliament urged the Commission to initiate immediately an in-depth monitoring

[298] Charles Oman and Christiane Arndt, 'Uses and Abuses of Governance Indicators' (2006) Development Centre of the OECD, <https://www.oecd-ilibrary.org/development/uses-and-abuses-of-governance-indicators_9789264026865-en>

[299] Katharina Pistor, 'Re-Construction of Private Indicators for Public Purposes' in Kevin Davis, Angelina Fisher, Benedict Kingsbury, and Sally Engle Merry (eds) *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford Scholarship Online 2012); Business Environment Risk Intelligence (BERI) in 1972 and the International Country Risk Guide (ICRG) in 1980.

[300] René Urueña, 'Indicators and the Law A Case Study of the Rule of Law Index' in Sally Engle Merry, Kevin E. Davis and Benedict Kingsbury (eds), *The Quiet Power of Indicators Measuring Governance, Corruption, and Rule of Law* (Cambridge University Press 2015) 80

process concerning the situation of democracy, the rule of law and fundamental rights in the country.[301]

Since then, the concept of measuring of the rule of law has become even more important in the EU judicially and institutionally, especially in the fight against violations of the rule of law. Such an example, is the contested Regulation on a general regime of conditionality for the protection of the Union budget, which created a horizontal 'conditionality mechanism' that made Member States' access to funds from the EU budget, conditional on respect for the principles of the rule of law.[302] In particular, Article 6(3) on the procedure states that "When assessing whether the conditions [for the adoption of measures] set out in Article 4 are fulfilled, the Commission shall take into account *relevant information from available sources, including decisions, conclusions and recommendations of Union institutions, other relevant international organisations and other recognised institutions*". Therefore, although not directly referring to indices measuring the rule of law, they could be considered as 'relevant information' in the sphere of the Regulation. The importance and raison d'être of the measurement of the rule of law within the Member States of the EU is therefore underlined.[303]

The emphasis and direction towards the use of empirical data in the EU can be attributed to the fact that measuring the rule of law can arguably warn of negative shifts and upcoming crises, such as the current backsliding of the rule of law in Europe, while by allowing trends within and across jurisdictions to be monitored, positive developments and examples of best practice can be revealed.[304] Currently, there is a large number of indices available that measure and monitor the rule of law in legal systems all over the world, which are not only summing up very complicated questions in easily understandable charts, but they are also proactively contributing towards democratic accountability and improvements in the government. **However, the existing indices are far from perfect and arguably not**

[301] European Parliament resolution of 10 June 2015 on the situation in Hungary (2015/2700(RSP)).
[302] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ L 433I, 22.12.2020, p. 1–10; See also Judgments of 16 February 2022, *Hungary v Parliament and Council,* C-156/21, ECLI:EU:C:2022:97 and *Poland v Parliament and Council*, C-157/21, ECLI:EU:C:2022:98.
[303] András Jakab & Viktor Lőrincz, 'Rule of Law Indices and How They Could be Used in the EU Rule of Law Crisis' (2019) Conference Paper No. 7/2019 2019 ESIL Annual Research Forum, Göttingen 4-5 April 2019, <https://ssrn.com/abstract=3513250>.
[304] Julinda Beqiraj and Lucy Moxham, 'Reconciling the Theory and the Practice of the Rule of Law in the European Union Measuring the Rule of Law' (2022) Hague Journal on the Rule of Law <https://doi.org/10.1007/s40803-022-00171-z>.

satisfactorily covering the needs of all the Member States of the EU for several reasons.[305]

This is particularly the case for the Republic of Cyprus, for which data is either completely missing (Bertelsmann Transformation Index) or the country has only been very recently added (World Justice Project). Moreover, as will also be discussed below, some of the indices currently in place adopt a rather narrow and thin conceptualisation of the rule of law, which is primarily focused on procedural features of the law/legal system. As a result, the indicators used and analysed (single features) remain non-substantive in nature, and the measurements included in the indices (composite indicators) provide only a limited account of the rule of law for the countries involved.[306]

One of the objectives of CRoLEV is to try and address this gap primarily for Cyprus. The Centre aims to act as an enabler of knowledge and propose ways in which the limited areas currently covered, as well as the methods currently employed by numerous indices, are expanded further to eventually assist the accuracy and effectiveness of rule of law indices on data for Cyprus. In other words, the research first attempts to identify *single indicators* important to measuring the rule of law, based on a pre-determined understanding of the rule of law (substantive in nature) that this report analyses in Section 3. After these single indicators are clearly identified, the *empirical part* of the research intends to measure them using both *objective and subjective data*.[307] The single features (indicators) selected are either completely missing from current indices measuring the rule of law in Cyprus or use different data to measure them. Therefore, the indicators identified and measured within the sphere of the project will constitute an original contribution to the current knowledge, enabling further development and expansion of the indicators used for already developed indices or even encouraging for the building of new ones which will fill the current gaps identified and satisfy the needs of all the Member States of the EU.

[305] András Jakab and Lando Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 German Law Journal 936-955.
[306] A remark on the terminology, by indicator or single feature we refer to a single number or feature, and by index we refer to composite indicators.
[307] See section 4.3.2. for further explanation on the methods and approaches adopted to select the data that will then be used to create the single indicators to be measured.

4.1 Why Measure the Rule of Law?

At its core, the rationale for measuring the rule of law is that you cannot improve something unless you first measure it. Fine-tuned constitutional law doctrines are always capable of identifying a de facto breach of the general requirements of the rule of law as defined above, by the addressees of constitutional rules, whether these are national governments or international organisations.[308] However, the question regarding the gravity of such breaches cannot be captured with the standard tools of legal doctrine alone. In order to fully grasp reality, one should also resort to rule of law indices. In other words, **besides considering the formal rules, we must also examine the de facto conduct of addressees of these rules and the narrative accompanying it, by measuring the rule of law.** The said narrative accompanying the addressees conduct, includes both the **social mentality and the political rhetoric regarding constitutional institutions, that usually form part of the data collection in rule of law indicators** as will be discussed below.

Rule of law indicators (usually part of longer indices) are veritable technologies of global governance, and it is important to engage with them, as they open a space for contestation, intervention, and policy debate on what it means to encourage the rule of law in the developing world.[309] Particularly, the concept of the rule of law has been described as "a transnational industry that constitutes a multi-billion dollar enterprise" and it has been noted that "[t]he global effort to build [the rule of law] has been accompanied by the development of numerous indicators that purport to measure the phenomenon".[310]

The increasing interest in using indices to measure the rule of law may be attributed to a variety of reasons including the many benefits that these frameworks provide. Indices or composite indicators[311] can be used to observe complex or multi-dimensional issues, or sum up complicated questions, in view of supporting decision and policy makers.[312] Moreover, they can also be used as external measures in debates about evaluating reforms or the

[308] András Jakab and Lando Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 German Law Journal 936-955.
[309] René Urueña, 'Indicators and the Law A Case Study of the Rule of Law Index' in Sally Engle Merry, Kevin E. Davis and Benedict Kingsbury (eds), *The Quiet Power of Indicators Measuring Governance, Corruption, and Rule of Law* (Cambridge University Press 2015) 75 - 102
[310] Mila Versteeg and Tom Ginsburg, 'Measuring the Rule of Law: A Comparison of Indicators' (2017) 47 Law & Social Inquiry, 100–137.
[311] The term composite indicator refers to the compilation of individual indicators into a single index on the basis of an underlying model.
[312] Andrea Saltelli, 'Composite Indicators Between Analysis and Advocacy' (2007) 81 Social Indicators Research 65-77, 68.

performance of the government, which can also assist in fostering and promoting best practices by comparing numbers of different countries. Consequently, the evaluation of the performance of the government, including the executive and judicial branches contributes to democratic accountability, as well as a more proactive legislative branch by encouraging the adoption of best practices and developments. Rule of law indices can therefore show the de facto situation, the law in action rather than the law in theory. They are capable of showing the extent of improvements and deteriorations of specific concepts in a country and more importantly these results constitute objective reflections (when done correctly) and not 'simply an opinion'.[313]

On the other hand, despite the benefits discussed above, several scholars have pointed out the limitations and shortcomings of measuring the rule of law and of particular indices.[314] A side-effect of the use of indices in governmental evaluations can be seen, for example, when a government solely changes a policy in order to change its score on a scale, without treating the real problem but rather to achieve 'justice in numbers'.[315] Concerns have also been expressed that measurement methods of the indicators selected, rely on data that is quickly out of date which ultimately requires for new approaches to data collection.[316] In particular, according to Weinberg, "while Rule of Law indices provide invaluable, longitudinal sources of information on the evolution of the Rule of Law situation they can hardly be called timely".[317] This is attributed to the fact that rapid shifts in context, such as a pandemic, terrorist attack, declaration of war or the establishment of a state of emergency more generally, can cause radical changes in the state of the rule of law. Yet none of this information will be picked up by surveys, where the process of establishing, conducting,

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[313] András Jakab and Lando Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 German Law Journal 936-955, 938.

[314] András Jakab and Lando Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 German Law Journal 936-955; Sally E Merry, Kevin Davis and Benedict Kingsbury (eds), *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (Cambridge Studies in Law and Society) (Cambridge University Press 2015)

[315] Pedro Rubim Borges Fortes, 'How legal indicators influence a justice system and judicial behavior: the Brazilian National Council of Justice and 'justice in numbers'' (2015) 47 Journal of Legal Pluralism and Unofficial Law 39-55

[316] Julinda Beqiraj and Lucy Moxham, 'Reconciling the Theory and the Practice of the Rule of Law in the European Union Measuring the Rule of Law' (2022) Hague Journal on the Rule of Law <https://doi.org/10.1007/s40803-022-00171-z>

[317] Nyasha Weinberg, 'Chasing reality: Rule of Law measurement is lagging years behind current developments', (Verfassungsblog, 30 July 2020) <https://verfassungsblog.de/chasing-reality/>

disseminating and evaluating the responses can take a couple of years.[318] This expectedly creates important hurdles for the users of governance and Rule of Law indices who require up to date information.

The use of indices for measuring and monitoring purposes, is even more problematic in the case of Cyprus. As explained above, the Republic of Cyprus is either completely missing from the measurements of indices, or specific data/information are lacking for various components which makes the overall evaluation incomplete and unprecise. On the other hand, the indices that do include sufficient data and information on Cyprus, are likely to have only recently included Cyprus in their measurements. The lack of measurements for longer durations/periods of time, prevents these data from being used to conclude on improvements and/or assess the effectiveness of newly adopted policies in the country. Therefore, if the rule of law is to be assessed in Cyprus and more importantly, the effectiveness of the measures adopted to tackle its potential backsliding, **it is indispensable to widen the pool of data on the country not only substantially but also chronologically**. With such an increase of information and data on the country, it would then be possible to create indicators to measure specific aspect of the rule of law and make comparisons with other Member States of the EU and beyond.

The challenge is that in the majority of cases, these indices are intending to measure **a directly unobservable phenomenon**, such as the rule of law,[319] which makes the task close to 'impossible'. For this purpose, a variety of approaches are used in the measurement tools discussed in the section that follows. Whichever approach is adopted to measurement, it is important that **those presenting the data are transparent about the way in which it was collected and processed, so that its robustness and reliability can be fully assessed by end users**.[320]

4.2 Existing Indices on the Rule of Law

There is current a large number of measurement tools which aim to assess the state of the rule of law around the world. These measurement tools or indices, vary in terms of how they

[318] Ibid
[319] András Jakab & Viktor Lőrincz, 'Rule of Law Indices and How They Could be Used in the EU Rule of Law Crisis' (2019) Conference Paper No. 7/2019 2019 ESIL Annual Research Forum, Göttingen 4-5 April 2019, <https://ssrn.com/abstract=3513250>
[320] Julinda Beqiraj and Lucy Moxham, 'Reconciling the Theory and the Practice of the Rule of Law in the European Union Measuring the Rule of Law' (2022) Hague Journal on the Rule of Law <https://doi.org/10.1007/s40803-022-00171-z>

conceptualise and define the rule of law, and which aspects they select for measurement. Consequently, their scientific validity and reliability also varies, depending on the type of sources used and/or the process for aggregation and weighting.[321] The current section will provide an overview of the most important indices currently used to measure the rule of law setting out their goals, the definition of the rule of law they use (if any), the pillars/indicators developed as well as their methodology in collecting data. These indices include the following: Worldwide Governance Indicators (WGI), World Justice Project (WJP), Bertelsmann Transformation Index (BTI), Freedom in the World (FIW), Annual Rule of Law Reports of the European Commission (Rule of Law Reports), and the EU Justice Scoreboard (EUJS).

The WGI project reports aggregate and individual governance indicators for over 200 countries and territories over the period 1996–2020, for *six dimensions of governance*: Voice and Accountability, Political Stability and Absence of Violence/Terrorism, Government Effectiveness, Regulatory Quality, Rule of Law and Control of Corruption.[322] These aggregate indicators combine the views of a large number of enterprise, citizen and expert survey respondents in industrial and developing countries. They are based on over 30 individual data sources produced by a variety of survey institutes, think tanks, NGOs, international organisations, and private sector firms.[323] The rule of law dimensions of governance is defined as "capturing perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence".[324] Therefore, the definition appears to rely more heavily on a procedural model of the rule of law, which is however broadly and inaccurately formulated. One of the main shortcomings of this index is that the rule of law is not explicitly measured, and it is insufficiently conceptualised.[325] It is evident that the emphasis of this framework (on global governance) is reflected in the choice of a definition that has market-based components (such as the explicit reference to property rights).

[321] Jim Parsons, 'Developing clusters of indicators: an alternative approach to measuring the provision of justice' (2011) 3 Hague Journal on the Rule of Law 170-185
[322] https://info.worldbank.org/governance/wgi/
[323] https://info.worldbank.org/governance/wgi/Home/Documents
[324] Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, 'The Worldwide Governance Indicators Methodology and Analytical Issues' (2010) Policy Research Working Paper 5430 <https://ssrn.com/abstract=1682130>
[325] Carmen R. Apaza, 'Measuring Governance and Corruption through the Worldwide Governance Indicators: Critiques, Responses, and Ongoing Scholarly Discussion' (2009) 42 Political Science and Politics 139-143.

The WJP is an NGO founded with the mission "to advance the rule of law around the world," based on the idea that "the rule of law provides the foundation for communities of opportunity and equity—communities that offer sustainable economic development, accountable government, and respect for fundamental rights".[326] Therefore, the main goal of the WJP is to promote the rule of law and it currently constitutes the most ambitious effort to measure the rule of law globally. According to the WJP, its indicator "builds on years of development, intensive consultation, and vetting with academics, practitioners, and community leaders from over 100 countries and 17 professional disciplines".[327] The WJP's index arguably uses the most comprehensive definition, and combines rights, crime and security, the absence of corruption, civil justice, and numerous other features into a single (multidimensional) indicator.[328] There are *four general Pillars*: Accountability, Just Law, Open Government, Accessible and Impartial Justice and these Pillars are developed into 8 different factors; 1. Constraints on government powers, 2. Absence of Corruption, 3. Open Government, 4. Fundamental Rights, 5. Order and Security, 6. Regulatory Enforcement, 7. Civil Justice and 8. Criminal Justice.

The theoretical framework linking these outcome indicators draws upon two main principles pertaining to the relationship between the state and the governed. The first principle, measures whether the law imposes limits on the exercise of power by the state and its various agents, as well as individuals and private entities.[329] This is measured in Factors One, Two, Three, and Four of the Index as numbered above. The second principle, measures whether the state limits the actions of members of society and fulfils its basic duties towards its population in order to serve the public interest, people are protected from violence, and all members of society have access to dispute settlement and grievance mechanisms. This is measured in Factors Five, Six, Seven, and Eight of the Index as numbered above. Although broad in scope, this framework assumes very little about the functions of the state, and when it does, it incorporates functions that are recognised by practically all societies, such as the pro-vision of justice or the guarantee of order and security.[330]

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[326] World Justice Project (WJP), 'The World Justice Project Rule of Law Index 2014' (2014) <http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf>
[327] World Justice Project (WJP), 'The World Justice Project Rule of Law Index 2014' (2014) <http://worldjusticeproject.org/sites/default/files/files/wjp_rule_of_law_index_2014_report.pdf>
[328] Mila Versteeg and Tom Ginsburg, 'Measuring the Rule of Law: A Comparison of Indicators' (2017) 42 Law & Social Inquiry 100-137
[329] World Justice Project, 'World Justice Project Rule of Law Index 2021' (2021), 13 <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf>
[330] World Justice Project, 'World Justice Project Rule of Law Index 2021' (2021), 13 <https://worldjusticeproject.org/sites/default/files/documents/WJP-INDEX-21.pdf>

The set of indicators used in the World Justice Project's Rule of Law Index attempts to strike a balance between 'thick' and 'thin' conceptions of the Rule of Law in order to enable it "to apply to different types of social and political systems, including those that lack many of the features that characterize democratic nations, while including sufficient substantive characteristics to render the rule of law as more than a system of rules".[331] This definition relies heavily on the substantive model advocated by Lord Bingham, among others, that stresses the importance of human rights. The final sentence demonstrates precisely that. The definition is well-informed, seeking to strike a balance between thin and thick conceptions of the rule of law.

The WJP is also unique in that it combines assessments from country experts (legal practitioners and experts) with perceptions of ordinary citizens, based on nationally representative surveys, to measure how the rule of law is experienced and perceived around the world. The soft data is collected from a General Population Poll (representative sample of 1000 respondents in each country) and from Qualified Respondents' Questionnaires, consisting of open-ended questions completed by in-country legal practitioners, experts, and academics with expertise in relevant legal disciplines. However, despite its comprehensiveness and effectiveness in measuring the rule of law, there is no description/evaluation of the results while Cyprus was only included in the index in 2021.

The Bertelsmann Transformation Index (BTI) analyses and evaluates whether and how developing countries and countries in transition are steering social change toward democracy and a market economy. It also entails an evaluation of the rule of law, which is identified as a component of the concept of Democracy used. The *four constituents* of the rule of law are partially overlapping, according to the traditional legal doctrine: Separation of powers, independent judiciary, prosecution of office abuse and civil rights.[332] The definition of democracy used is market-based—it falsely suggests that economic growth and a rule-of-law democratic system are connected. The definition of the rule of law heavily relies on a formal model, but because it is read within the context of a democratic system, it maintains some substantive elements including the connection with democracy and civil rights. The methodology of BTI data collection and analysis is primarily based on expert opinions. Apart from the problematic, market-based conceptualisation of democracy, suggesting that

[331] World Justice Project, 'World Justice Project Rule of Law Index 2020', (2020), 9, <https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf>
[332] https://bti-project.org/en/methodology

economic growth is linked with a rule of law system, the BTI is not explicitly targeting the rule of law while no data is available for Cyprus.

The FIW or Freedom House Index accesses the condition of political rights and civil liberties around the world.[333] As part of its mission, Freedom House "speaks out against the main threats to democracy and empowers citizens to exercise their fundamental rights" and analyses "the challenges to freedom; advocate[s] for greater political and civil liberties; and support[s] frontline activists to defend human rights and promote democratic change".[334] Like the definitions provided by the WGI, Freedom House's definition combines *procedural elements* (such as absence of abuse by state agents and an independent judiciary) with *substantive elements* (civil liberties, bodily integrity, and substantive equality).[335] These substantive values appear to constitute at least half the information on which Freedom House bases its country scores. Unlike the WGI, however, the Freedom House index does not capture the protection of private property rights or the security of private contracts. Political rights are divided into subcategories namely, electoral process, political pluralism and participation and functioning on government. Civil rights are also divided into subcategories namely, freedom of expression and belief, associational and organisation rights, rule of law, personal autonomy. The rule of law is thus identified as a subcategory of civil liberties. That approach forces a link between democratic self-governance and the rule of law. There is no definition of the rule of law available, but it is identified through four questions used to measure it touching upon the independence of the judiciary, Due process in civil and criminal matters, Protection from illegitimate use of force and Equal treatment of everyone. The index relies on soft data collected from experts but there is arguably a lack of transparency about those experts, including who they are and the selection process, while the rule of law is again not explicitly targeted.[336]

The last two indices to be discussed are EU-focused rather than global as the previous four indices. First, the Annual Rule of Law Reports which monitor significant developments, both positive and negative, relating to the rule of law in Member States. It covers four *pillars*: the justice system, the anti-corruption framework, media pluralism, and other institutional issues

[333] US-based NGO "dedicated to the expansion of freedom around the world"
[334] https://freedomhouse.org/about-us#.VBhuvlbXHG4
[335] Mila Versteeg and Tom Ginsburg, 'Measuring the Rule of Law: A Comparison of Indicators' (2017) 42 Law & Social Inquiry 100-137
[336] Diego Giannone, 'Political and Ideological Aspects in the Measurement of Democracy: The Freedom House Case' (2010) 17 Democratization 68-97

related to checks and balances.[337] Despite the broader account of the rule of law compared to previous indices, there is no clear definition of the rule of law provided. The lack of definition mirrors the greater problem at the EU level: different institutions rely on different accounts of the rule of law for different purposes.[338] For instance, the definition used by the Commission in these reports, appears to be quite broad, including substantive components, such as media pluralism. However, it is not extended enough to touch on human rights or other broader democratic components such as political participation or treatment of dissent. The information and data are drawn from a variety of sources combining soft and hard data. The data sources include the EU Justice Scoreboard, the Eurobarometer (on public opinion), the Committee for the efficiency of justice, reports from international organisations (e.g., World Bank), contributions from MS and other stakeholders, country visits and a list of stakeholders involved. Informed citizens can also participate to country surveys.

Last, the EUJS is an initiative from the European Commission which was presented for the first time in March 2013.[339] It was primarily designed to address "the negative growth spiral" after the 2008 economic and financial crisis. For this reason, the EUJS is currently concerned too with the financial guarantees and the infrastructure of the judicial system, instead of a holistic analysis of the rule of law.[340] However, since 2020, the EUJS also informs the Annual Rule of Law Report to be presented by the European Commission.[341] The EUJS constitutes an *annual comparative information tool*. Its purpose is to assist the EU and Member States improve the effectiveness of their national justice systems by providing objective, reliable and comparable data on a number of indicators relevant for the assessment of the (i) efficiency, (ii) quality and (iii) independence of justice systems in all Member States.[342]

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337 https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism_en#:~:text=The%20Rule%20of%20Law%20Report%20monitors%20significant%20developments%2C%20both%20positive,related%20to%20checks%20and%20balances.

338 See section 2.3. for more details on the Institutions responses in securing the rule of law in the EU.

339 Press Conference and Speech by the EU Justice Commissioner Viviane Reding, 'The 2013 EU Justice Scoreboard' (Brussels, 27 March 2013) https://ec.europa.eu/commission/presscorner/detail/fr/SPEECH_13_271

340 András Jakab and Lando Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 German Law Journal 935-955

341 Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, COM (2020) 580 final (Sept. 30, 2020), https://ec.europa.eu/info/sites/info/files/communication_2020_rule_of_law_report_en.pdf

342 Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions 2022 EU Justice Scoreboard COM (2022) 234

The formal definition adopted by the EUJS is narrow, focusing on the justice system: the efficiency, independency and quality of the judicial system. Therefore, the focus of EUJS does not meet the broad understanding of the rule of law reports published annually by the Commission, discussed above. As it stands, the EUJS only measures whether a justice system is generally capable of delivering justice. It does not measure, however, whether it is actually working as an independent judiciary.[343] The EUJS seems to openly admit the shortcoming by stating that "The figures presented in the Scoreboard do not provide an assessment or present quantitative data on the effectiveness of the safeguards. They are not intended to reflect the complexity and details of the safeguards".[344] However, they also seem to justify this shortcoming by falsely arguing that "[h]aving more safeguards does not, in itself, ensure the effectiveness of a justice system". In fact, this self-imposed limitation unnecessarily could restrict the performance of the EUJS in informing EU institutions on the state of the rule of law in the Member States. For the preparation of the EUJS index, only hard data are collected through various mechanisms including from the Member States. Large parts of the quantitative data are provided by the Council of Europe's European Commission for the Efficiency of Justice (CEPEJ), with which the Commission has concluded a contract to carry out a specific annual study.[345] This data ranges from 2012 to 2020 and has been provided by Member States according to CEPEJ's methodology. [346] In cases where soft data are displayed, these are drawn from the Eurobarometer (measuring public perceptions). Difficulties remain in the gathering of data often because of insufficient statistical capacity which results in data missing for certain Member States. Cyprus is one of these states for which data is missing on various components including the number of incoming civil and commercial litigious cases, the estimated time to resolve litigious civil and commercial cases, the rate of resolving

[343] András Jakab and Lando Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 German Law Journal 935-955

[344] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions 2020 EU Justice Scoreboard, COM(2020) 306 <https://ec.europa.eu/info/sites/default/files/justice_scoreboard_2020_en.pdf>

[345] https://ec.europa.eu/commission/presscorner/detail/en/QANDA_22_3147

[346] Other sources of data are the group of contact persons on national justice systems, the European Network of Councils for the Judiciary (ENCJ), the Network of the Presidents of the Supreme Judicial Courts of the EU, the Association of the Councils of State and Supreme Administrative Jurisdictions of the EU (ACA-Europe), the European Competition Network, the Communications Committee, the European Observatory on infringements of intellectual property rights, the Expert Group on Money Laundering and Financing of Terrorism, Eurostat, and the European Judicial Training Network (EJTN).

litigious civil and commercial cases and the number of pending litigious and commercial cases.

The assessment of the existing indices above has shown that for different reasons, none of them are perfect as they stand. While the Freedom House Index is outdated, the Bertelsman Index simply does not cover the EU Member States. The World Justice Project's methodology changes over time and therefore, does not allow an assessment of changes of the rule of law. More importantly, the data provided for Cyprus is often lacking, which creates the need to either update/enhance the current indices or construct new ones.[347]

4.3 Methodological Approach of Measuring aspects of the Rule of Law

The construction of an index to measure governance or the concepts such as the rule of law, is not a straightforward procedure and it involves assumptions, data collection and analysis which have to be assessed carefully and structurally. For instance, the OECD Methodology and User Guide on constructing composite indicators, proposes ten different steps to be followed in order to design, develop, construct and disseminate composite indicators or indices. These steps include the identification of the relevant theoretical framework, data selection, imputation of missing data, multivariate analysis, normalisation, weighting and aggregation, analysis to assess the robustness and sensitivity of the indicators, transparency of data, attempts to link to other variables and finally the presentation and visualisation.[348] The table attached in **Annex II** of this Report explains the steps in the construction of composite indicators in more detail. This particular methodological work, provides an analysis of good practices in composite indicators and has been characterised as timely, also considering the increased interest in the use of indices.[349]

Due to the complex character of the several indices discussed above and the countless methodological challenges that would be faced during the construction of such an index, **the research is not intending to construct an entirely new index but to rather measure specific aspects of the rule of law particularly for Cyprus.** This will be done by identifying single indicators, important to the measurement of the rule of law, based on the theoretical framework that is adopted in the conceptualisation of the rule of law, within the realm of the

[347] See Annex I for a detailed comparative table with the characteristics of each index discussed.
[348] Michela Nardo, Michaela Saisana, Andrea Saltelli, Stefano Tarantola, Andres Hoffman and Enrico Giovannini, 'Handbook on constructing composite indicators: methodology and user guide' (2005) OECD Statistics Working Paper by, STD/DOC(2005)
[349] Andrea Saltelli, 'Composite Indicators Between Analysis and Advocacy' (2007) 81 Social Indicators Research 65-77

research. The objective of this empirical exercise is to try and (at least partially) fill the gap created by the lack and/or complete inexistence of data on aspects of the rule of law in Cyprus. **The pool of data on Cyprus will thus be widened further in order to allow us to construct and measure relevant indicators which could eventually be used in other indices which adopt similar approaches to the rule of law.**

Together, the theoretical and empirical analysis of the research **will significantly contribute to the current knowledge on the state of the rule of law in Cyprus which is arguably understudied at the moment**. Moreover, it will constitute the basis for further analysis and use of the selected indicators to (a) **develop more extensive indices**, (b) **use those indices to compare best practices to other countries of the EU and beyond;** and (c) **allow for long-term assessment of policies adopted to tackle the backsliding of the rule of law**. The methodological approach of measuring aspects of the rule of law within the sphere of the project, will begin by refining our conceptualisation of the rule of law and explain the importance of this stage for the research. Once it is explained what the research is intending to measure, it will move on to explain the methodology of selecting data/indicators, the type of data that the research intends to gather and the methods through which these data will be collected. The section will then explain what (statistical) analysis is going to take place after collecting the relevant data as well as the ways in which the result will be visualised in the sphere of the project. Last, the good practice that will be followed to ensure transparent and unbiased data will be set out.

4.3.1 Defining the rule of law and European values

Most of the issues that are described with indices or composite indicators are complex or even controversial concepts, such as for instance the quality of education, economic development or the rule of law. As a result, **a theoretical framework** should be developed to provide the **basis for the selection and combination of single indicators into a meaningful composite indicator under a fitness-for-purpose principle.**[350]

The complexity of the issue in question (in this case of the rule of law) is reflected by **the multi-dimensionality and multi-scale representation (or conceptualisation) of the issue**

[350] Michela Nardo, Michaela Saisana, Andrea Saltelli, Stefano Tarantola, Andres Hoffman and Enrico Giovannini, 'Handbook on constructing composite indicators: methodology and user guide' (2005) OECD Statistics Working Paper by, STD/DOC(2005)

in the theoretical framework developed.[351] Therefore, if a definition of the rule of law is accepted that requires integrating a broad set of points of view, then the challenge is to reduce the complexity in a measurable form. In other words, a theoretical framework should be developed to allow us to reduce an entire system into parts and subsequently non-measurable issues are replaced by parts that can be observed and measured. The controversy surrounding multidimensional measures can therefore be put into context if one considers these measures as models, in the mathematical sense of the term.

However, these parts that eventually become **measurable models** are only valid within the given **information space**, namely the theoretical framework adopted. As a result, the model of the system will reflect only some of the characteristics of the real system, together with the choices made by the scientists on how to observe the reality.[352] Consequently, it has been interestingly argued that "all models are wrong, some are useful" as the individual pieces of a puzzle (single indicators forming an index) could possibly hide the while picture.[353] It is therefore important that the theoretical framework adopted, based on which the model will be developed, fits the objectives and intentions of the user. No matter how subjective and imprecise the theoretical framework is, it implies the recognition of the multidimensional nature of the phenomenon to be measured, and the effort of specifying the single aspects and their interrelation.[354]

In light with the analysis above, the exact meaning of the rule of law is contested. Therefore, before proposing a new framework or in our case the indicators (or single features) that we want to assess, it is important to consider how it has been conceptualised by legal and/or social scholars. The definitions and formulations discussed above,[355] consider both formal-procedural and substantive-material conceptions of the rule of law. In other words, it identifies two principal approaches to the rule of law, namely the thin and the thick.

The theorists who embrace a thin approach to the rule of law, such as Joseph Raz, Jeremy Waldron and HLA Hart, insist that the rule of law does not have inherent connections with

[351] Michaela Saisana & Andrea Saltelli, 'Rankings and Ratings: Instructions for Use' (2011) 3 Hague Journal on the Rule of Law 247-268.
[352] Ibid.
[353] George E P Box, William G Hunter, Stuart Hunter, Statistics for Experimenters: An Introduction to Design, Data Analysis, and Model Building (John Wiley & Sons, 1978).
[354] Michaela Saisana & Andrea Saltelli, 'Rankings and Ratings: Instructions for Use' (2011) 3 Hague Journal on the Rule of Law 247-268.
[355] See Section 3 of the Report.

substantive moral and/or political ideas such as human rights, freedom or democracy.[356] The principal idea is that the rule of law is a *specific quality* associated with specific elements of the law, stressing judicial independence, access to justice, access to legal counsel and the quality of the judicial system more generally. The EU Justice Scoreboard discussed above, is one of the indices that adopt a more procedural (thin) approach to the rule of law, since the understanding given to the rule of law is focusing merely on the justice system of the Member States, including efficiency, independency, and quality of the justice system. Due to this narrow focus adopted, the EUJS does not meet the broad understanding of the rule of law report published by the Commission either. While the annual law reports acknowledge the importance of informal rules for the rule of law, such as the anti-corruption framework and media pluralism, the EUJS relies merely on formal rules.

On the other hand, the theorists who adopt a more substantive (thick) approach to the rule of law, suggest that the rule of law cannot be simply perceived as a list of formal requirements of law. Although formal requirements do constitute an important component of the rule of law, it is suggested that there is also an *intrinsic link* between the rule of law and other more substantive ideas, including different political ideas.[357] Substantive ideas to the rule of law also draw connections with other European values such as human dignity and fundamental human rights, and democracy in the sphere of inter alia enhancing free speech and checks in the use of power.[358] The World Justice Project (WJP) is one of the indices measuring the rule of law that strikes a good balance between thin and thick approaches to the rule of law. As discussed above the definition of the rule of law adopted in the methodology, relies heavily on the substantive model advocated by Lord Bingham, which is not only broader in nature but stresses the importance of human rights.

The perception of the rule of law that this project adopts is a substantive one, linking the rule of law with some values identified as fundamental by the EU, in particular democracy. Our approach to the definition of the rule of law assumes a substantive model of democracy that is not simply processual but also imposes substantive limitations on what a democratic decision would look like. According to this definition the entire rule of law structure is undermined when laws violate key democratic components such as free speech

[356] See Section 3.1.1 for a detailed analysis of the thin approaches to the rule of law.
[357] See Section 3.1.2 for a detailed analysis of the thick approaches to the rule of law.
[358] See Section 3.1.3 for a detailed analysis of the connections between the rule of law and other European values.

and dissent, despite not explicitly violating judicial independence or formal characteristics of the law.

4.3.2 Selecting data/indicators

Once we have precisely determined the theoretical framework of the concept we would like to measure, the data for this measurement must be identified. This exercise includes (a) the type of data that need to be collected, (b) the methods chosen to collect that data and (c) the time period / timeframe that these data is covering. According to Nardo et al, the data must be based on the "analytical soundness, measurability, country coverage, and relevance of the indicators to the phenomenon being measured and relationship to each other".[359] Moreover, the data collected, in whatever form and scale, must be of good quality, unbiased and transparent.[360]

While the choice of indicators must be guided by the theoretical framework, the data selection process can be quite subjective as there may be no single definitive set of indicators for a particular concept in assessment.[361] In particular, the data that will be collected to build and measure specific indicators, will be hard (quantitative) and/or soft (qualitative) data. Hard data is referring to approximate facts, which are directly measurable, factual and indisputable, and arguably more objective in nature. [362] In the legal field, hard data could include registered crime, frequency of modification of the laws, number of judicial reviews or number of challenges of acts of the state. On the other hand, soft data is referring to the opinion of experts or that of the public and it implies that data is collected from human qualitative observations. Their 'subjectivity' does not make these data unreliable or weak, yet additional safeguards are necessary to ensure their transparency and reliability.

In fact, soft data is often seen as the best way of conducting research, such as for instance in business decisions that are based on product reviews or customer satisfaction. Same applies in the legal field and particularly in measuring the rule of law since most of the current indices available focus their methodologies on soft data. For instance, the World Justice

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[359] Michela Nardo, Michaela Saisana, Andrea Saltelli, Stefano Tarantola, Andres Hoffman and Enrico Giovannini, 'Handbook on constructing composite indicators: methodology and user guide' (2005) OECD Statistics Working Paper by, STD/DOC(2005); See the Table attached in Annex II.

[360] See Section 4.3.4 for a detailed discussion on how the quality and transparency of the data is ensured.

[361] Michaela Saisana & Andrea Saltelli, 'Rankings and Ratings: Instructions for Use' (2011) 3 Hague Journal on the Rule of Law 247-268.

[362] Jim Parsons, 'Developing Clusters of Indicators: An Alternative Approach to Measuring the Provision of Justice', (2011) 3 Hague Journal on the Rule of Law 170–185.

Project collects data through general population polls and qualified respondents' questionnaires, the Bertelsmann Transformation Index is developed based on expert opinions and so is the Freedom House Index. Qualitative data can be collected by surveys, poll or questionnaires that are either directed to the general population or to experts in the field.

A key concern regarding expert opinions is the choice of experts and the subjectivity of the opinion. Challenges could arise for instance, if the expert belongs in a particular political party and the survey is concerning acts of a particular government, or even more importantly in politically polarised countries.[363] A further challenge in relation to expert opinions is the difficulty of finding experts that are up-to-date in several fields relevant to the topic in evaluation, and are able to answer the surveys/questionnaires.[364] This is a possible scenario when collecting expert opinions in the field of the rule of law, which is a broad legal concept, covering aspects of constitutional law, criminal law, human rights, administration and legal philosophy.

On the other hand, collecting soft data from the general population through polls and surveys has the advantage of taking into consideration the situation of vulnerable groups or the opinion/ perception of the general society that are not experts in the field concerned.[365] The opinion of the general public is not only more inclusive with less represented groups but it also reveals the perspective of the general society which is particularly helpful with legal concepts that involve trust in the government and the judicial system for instance. However, the wide opinion polls are considerably more expensive and the results you can get are limited to very specific questions as the general population does not always possess deep understanding of the issues in questions. In addition, public opinion is arguably keener to changes and easily influenced by the media. As will be explained below, these two reasons are part of why **our research will only be collecting soft data from experts in the field rather than the general population.**

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[363] 'The UN Rule of Law Indicators: Implementation Guide and Project Tools' (United Nations publication 2011) 1 <https://www.un.org/ruleoflaw/files/un_rule_of_law_indicators.pdf> ; "This approach is particularly appropriate in conflict and post-conflict situations where allegiances may be polarized as a result of the conflict and where there may be little confidence in the integrity of officials or the motivations of international organizations."

[364] András Jakab & Viktor Lőrincz, 'Rule of Law Indices and How They Could be Used in the EU Rule of Law Crisis' (2019) Conference Paper No. 7/2019 2019 ESIL Annual Research Forum, Göttingen 4-5 April 2019, <https://ssrn.com/abstract=3513250>.

[365] András Jakab and Lando Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 German Law Journal 936-955.

For the current empirical research, a combination of hard and soft data will be used. Although the use of hard data is as stated above, more objective in nature, for the research that the project intends to pursue hard data only is not enough. In particular, hard data is often not available for Cyprus from the indices discussed above, which creates the need of either collecting information from scratch on a particular topic, or supplementing the gaps with expert opinions. Second, the scope of measurement only based on hard data would be rather limited, as some questions and information can only be gathered by experts, such as the perception of justice officials and lawyers on the rule of law.

Therefore, within the framework of the current research, hard data will be collected from well-established indices such as the EU Justice scoreboard to collect information towards a thin approach of the rule of law, including the independence of the judiciary. However, the EUJB lacks information on various components on Cyprus such as the number of incoming civil and commercial litigious cases, the estimated time to resolve litigious civil and commercial cases, the rate of resolving litigious civil and commercial cases and the number of pending litigious and commercial cases. Therefore, more in-depth research will need to be conducted on the national level, if this information is needed for the research. Moreover, according to the theoretical framework discussed above, **the perception of the rule of law that this project adopts is a substantive one, linking the rule of law with European values and particularly democracy**. Further hard data will thus be collected on the national level on particular phenomena linked to the perception of the rule of law that is connected with democracy, such as the number of lawful protests, the cases of unlawful protests and the use of violence by the police, as well as the number of infringement procedures under EU law against Cyprus.

Soft data will also be collected both to supplement the lack of hard data in some instances, as well as to answer more subjective questions on the rule of law. As explained above, the soft data will only be collected from experts in the field rather than the general population, partially because of the high cost in conducting more extensive surveys and due to the fact that the general population cannot possibly answer very specific questions relevant to the rule of law. Especially because the research is heavily focused on the application and measurement of the rule of law in Cyprus. **In order to collect these data, one survey and two focus groups will be conducted with lawyers and legal professionals with the objective of assessing inter alia, the practitioners' attitude towards the rule of law, aspects of the rule of law not recorded (e.g., covid-19 responses) and the relationship**

between democracy and the rule of law. In order to secure the objectivity of the experts and the collection of unbiased data, a transparent selection process will be followed with the intention of involving as many experts as possible, at least for the survey. Also, the proportion of the experts must be balanced in gender and ethnic distribution.[366]

It is argued **that the combination of collecting both hard and soft data within the framework of a more substantive understanding of the rule of law will contribute towards the creation of novel indicators and original measurements for Cyprus.**

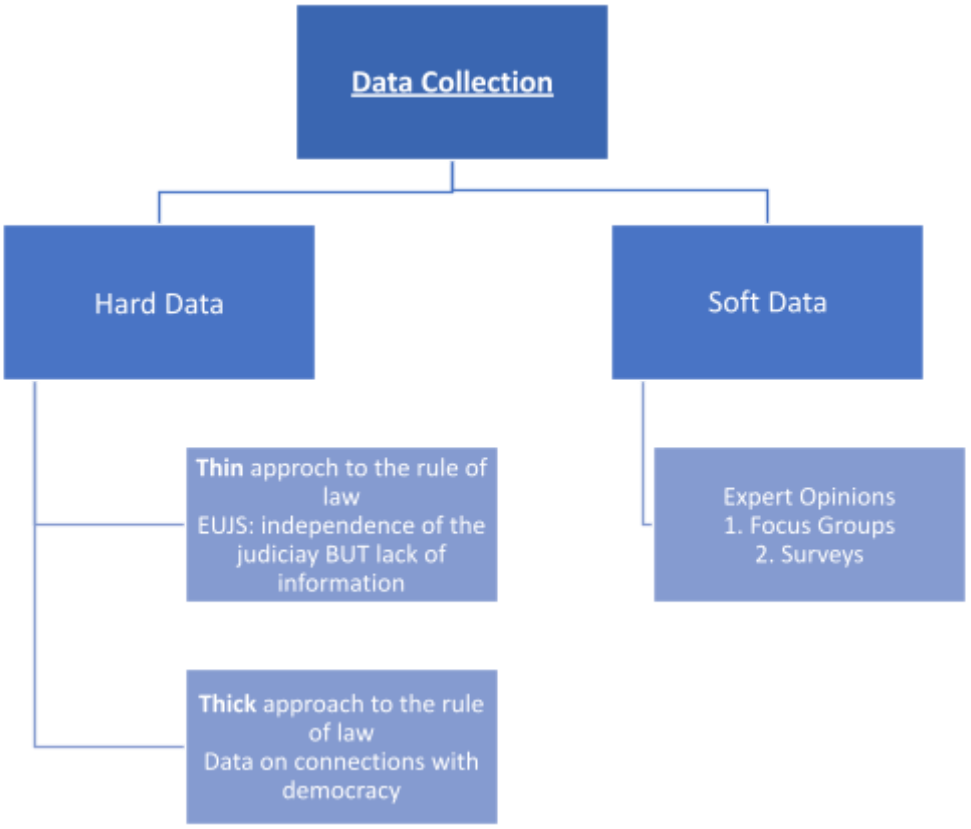

Table: Plan of Data Collection before any statistical analysis.

4.3.3 Data Analysis and Visualisation of results

Based on the method of collection, different types of data become available for processing. The hard data collected will possibly be measured with approximate numbers that will then be translated into the single indicators created. The soft data collected can be presented in various forms. The so-called binary data refer to yes or no answers (1 or 0), the ordinal data refer to data that can be measured on a given scale such as questions on a scale from 1 to 10

[366] Ibid

(for instance, the experts of the Freedom House evaluate the questions on a scale ranging from 1 to 7). Metric data refer to the data that can be measured by percentages (for instance, the impact of the financial crisis on personal finances in the Eurobarometer).[367] In order to put all the data in one final index, they need to be homogenised in one common measuring format which is part of the statistical analysis.[368] As observed above, due to the many methodological challenges, within the sphere of the current empirical research, **the aim is not to create one final index but rather to develop and measure specific single indicators**. In order to facilitate the measuring procedure of soft data for this purpose, the surveys and other data collection methods will use the same type of evaluation that will then be aggregated accordingly in single indicators.

At the current stage, no questions of weighting will be raised, as the empirical research will end at the measuring stage of single indicators, possibly within a specific period of time in Cyprus. In other words, **there is no need to consider whether and which indicators are more important than others**. A clear and precise method of weighting the indicators between each other, according to the underlying theoretical framework,[369] will become indispensable in the future, if an index is created which would require the aggregation of all the single indicators currently measured.

After measuring the relevant single indicators according to the underlying theoretical framework discussed above, the results will be **visualised in a dashboard**.[370] Although the results can be effectively presented in a dashboard that will take the form of a chart/graph, the textual information is also needed for their interpretation and correlation. Indices that weight and aggregate their indicators which are also extended to multiple countries, represent their results on a map, or the countries can be classified into clusters. **Within the sphere of this project, the dashboard, besides the measurements of the single indicators relevant to the rule of law, will also clearly demonstrate the gaps in Cyprus as well as the areas of possible development and improvement.**

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[367] The Eurobarometer methodological approaches <https://europa.eu/eurobarometer/about/eurobarometer>

[368] András Jakab and Lando Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 German Law Journal 936-955.

[369] Howard Rosenthal and Erik Voeten, 'Measuring Legal Systems' (2007) 35 Journal of Comparative Economics 711–728.

[370] The dashboard will become available on www.crolev.eu.

4.3.4 Ensuring transparent, credible and unbiased results

Whichever theoretical framework is adopted and whatever the data and collection methods, it is important that measurement frameworks are transparent, and clearly articulate their conceptual underpinnings so that those relying on the data can make fully informed decisions.[371] **As long as the process of data/information collection and processing is transparent and contestable, individual indicators (in the case of the current research) or aggregate indices can be used for appraising the need for, and the success of, policy interventions.**[372] The problems with the construction of the institutional quality variables are rooted in the ideology that motivated their selection, reconstruction, and use without much transparency.[373] Moreover, the scientific validity and reliability of the measurement tools of the well-established indices discussed above, could vary depending on the type of sources used primary or secondary, quantitative data, public surveys, expert assessments, document reviews etc.), and the process for aggregation and weighting.[374]

Throughout the report transparency and unbiased data have been repeatedly mentioned, as we consider them the most important principles that must be followed for the duration of the entire process from the conceptualisation of the rule of law, to the data collection and then to the analysis and visualisation of the results. The project will ensure to carry out the empirical research with the utmost transparency and credibility. Moreover, **the scientific validity and reliability of the measurement tools** used to build the rule of law indicators, is another priority of the current research. First, a proper and concrete definition of the theoretical framework will be agreed in order to ensure the relevance of the indicators that will be developed and avoid any weak legal and analytical spots.

The data collection process will be conducted with accuracy, credibility and timeliness in consideration. The **non-arbitrary selection of participants and experts in the data collection** is one of the principal ways of ensuring that the data collected (and eventually the indicators built) are transparent and unbiased. As explained above, the soft data will only be

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[371] Julinda Beqiraj and Lucy Moxham, 'Reconciling the Theory and the Practice of the Rule of Law in the European Union Measuring the Rule of Law' (2022) Hague Journal on the Rule of Law <https://doi.org/10.1007/s40803-022-00171-z>

[372] Katharina Pistor, 'Re-Construction of Private Indicators for Public Purposes' in Kevin Davis, Angelina Fisher, Benedict Kingsbury, and Sally Engle Merry (eds) *Governance by Indicators: Global Power through Quantification and Rankings* (Oxford Scholarship Online 2012).

[373] Ibid.

[374] Julinda Beqiraj and Lucy Moxham, 'Reconciling the Theory and the Practice of the Rule of Law in the European Union Measuring the Rule of Law' (2022) Hague Journal on the Rule of Law <https://doi.org/10.1007/s40803-022-00171-z>

collected from experts in the field rather than the general population, partially because of the high cost in conducting more extensive surveys and due to the fact that the general population cannot possibly answer very specific questions relevant to the rule of law. Especially because the research is heavily focused on the application and measurement of the rule of law in Cyprus. In order to secure the objectivity of the experts and the collection of unbiased data, a transparent selection process will be followed with the intention of involving as many experts as possible, at least for the survey. Also, the proportion of the experts must be balanced in gender and ethnic distribution.

In terms of data analysis, the normalisation phase is crucial both for the accuracy and the coherence of final results. An inappropriate normalisation procedure can give rise to unreliable or biased results while the interpretability of the composite indicator relies heavily on the correctness of the approach followed in the normalisation phase.[375] As discussed above, in order to facilitate the measuring process of soft data and avoid an inappropriate normalisation of data, the surveys and other data collection methods will use the same type of evaluation that will then be aggregated accordingly in single indicators.

Last, **openness** will be ensured through open and transparent data and resources. In particular, the results of the research as well as the dashboard will become publicly available in the project's website, which can then be used as didactic material for anyone interested in the state of the rule of law in Cyprus.

5 Concluding Remarks

The rule of law is a contested concept. The EU Treaties contain no indication as to its definition. Article 2 TEU does not identify any of the foundational values listed, nor does it provide for a hierarchy. Due to its complexity, including disagreement on its definition and scope between EU institutions themselves, the ECJ has also been conspicuously ambivalent about the scope and the extent of the rule of law in its decisions. However, despite the fractured nature of the concept of the rule of law on the EU level as discussed in the Report, its importance as well as the fact that is currently under threat, cannot be contested.

From the financial to the refugee crisis, to the ongoing Covid-19 pandemic and war in Ukraine, the Union and each Member State have faced several emergency situations and have been forced to take immediate action. The rule of law has been under threat for several years

[375] Ibid.

with the current pandemic only exacerbating the concerns about the state of the rule of law in Europe. A pressing need exists for further research and analysis of the state of the rule of law and values across the EU, taking into account new developments, and renewed challenges from different perspectives, that arose both nationally and supranationally.

The monitoring and measuring of the rule of law through composite indicators and indices has become a useful tool to tackle the continuous backsliding of the rule of law. As explained in the Report, measuring the rule of law can arguably warn of negative shifts and upcoming crises, such as the current backsliding of the rule of law in Europe, while by allowing trends within and across jurisdictions to be monitored, positive developments and examples of best practice can be revealed. Despite the large number of indices currently available that measure and monitor the rule of law in legal systems globally, none of them is satisfactorily covering the needs of all the Member of the EU, while Cyprus remains one of the Member States that does not have sufficient representation in those indices. One of the objectives of CRoLEV is to try and address this gap primarily for Cyprus. In other words, the research first attempts to identify single indicators important to measuring the rule of law, based on a pre-determined understanding of the rule of law (substantive in nature). After these single indicators are clearly identified, the empirical part of the research intends to measure them using both objective and subjective data. The single features (indicators) selected are either completely missing from current indices measuring the rule of law in Cyprus or are measured through different data. Therefore, the indicators identified and measured within the sphere of the project will constitute an original contribution to the current knowledge, enabling further development and expansion of the indicators used for already developed indices or even encouraging for the building of new ones which will fill the current gaps identified and satisfy the needs of all the Member States of the EU.

Through the normative and empirical research, as well as through the rest of the deliverables, CRoLEV intends to generate important knowledge and insights that will be valuable for policy-making both at the European and the domestic level as it will endeavour to identify steps policy makers can take to secure rule of law and value protections and guard against their deterioration. By disseminating the project's research outputs in Cyprus, neighbouring countries, and other partner institutions, the Centre will strengthen European studies in the Eastern Mediterranean region and beyond. The project's recommendations will also be of value to state and EU authorities, as well as international actors within and beyond the EU.

Annex I

	Goal	Definition of Rule of Law	Pillars/indicators	Methodology
Worldwide Governance Indicators (WGI)	Aggregate and individual governance indicators	'Rule of law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.'	Six dimensions of governance: 1. Voice and Accountability 2. Political Stability and Absence of Violence/Terrorism 3. Government Effectiveness 4. Regulatory Quality (perception of govt's ability to formulate and implement sound policies and regulations that permit and promote private sector development) 5. Rule of Law 6. Control of Corruption	Compiling and summarising information from over 30 existing data sources. Those data sources report the views and experiences of citizens, entrepreneurs, and experts in the public, private, and NGO sectors from around the world. Types of source date: surveys of household and firms, commercial business information providers, NGOs, public sector organisations
Rule of Law Index (World Justice Project)	The Index relies on national surveys of households and legal practitioners and experts to measure how the rule of law is experienced and	The first principle, measures whether the law imposes limits on the exercise of power by the state and its agents, as well as individuals and private entities. The second principle, measures whether the state limits the actions of members of society and fulfils its basic duties towards its population so that	Four Pillars: 1. Accountability 2. Just Law 3. Open Government	Focusing on soft data. Collected through: a. General Population Poll (representative sample of

	perceived around the world	the public interest is served, people are protected from violence, and all members of society have access to dispute settlement and grievance mechanisms. Although broad in scope, this framework assumes very little about the functions of the state, and when it does, it incorporates functions that are recognized by practically all societies, such as the provision of justice or the guarantee of order and security. The resulting set of indicators is also an effort to strike a balance between what scholars call a "thin" or minimalist conception of the rule of law that focuses on formal, procedural rules, and a "thick" conception that includes substantive characteristics, such as self-governance and various fundamental rights and freedoms. Striking this balance between "thin" and "thick" conceptions of the rule of law enables the Index to apply to different types of social and political systems, including those that lack many of the features that characterize democratic nations, while including sufficient substantive characteristics.	4. Accessible and Impartial Justice Those pillars are developed in the following 8 factors 1. Constraints on government powers 2. Absence of Corruption 3. Open Government 4. Fundamental Rights 5. Order and Security 6. Regulatory Enforcement 7. Civil Justice 8. Criminal Justice And 44 sub-factors	1000 respondents in each country) Qualified Respondents' Questionnaires: consisting of open-ended questions completed by in-country legal practitioners, experts, and academics with expertise in relevant legal disciplines

Bertelsmann Transformation Index	Evaluates and measures transition to democracy and market economy	The rule of law is identified as a component of the concept of Democracy used. The four constituents of the rule of law are partially overlapping, according to the traditional legal doctrine: (1) Separation of powers, (2) Independent judiciary, (3) Prosecution of office abuse, (4) Civil rights.	(1) Separation of powers, (2) Independent judiciary, (3) Prosecution of office abuse, (4) Civil rights.	Primarily based on expert opinions. Provides detailed reports
Freedom House	Assesses the condition of political rights and civil liberties around the world.	Political rights are divided into subcategories: 1. Electoral Process 2. Political Pluralism and Participation 3. Functioning on Government Civil Rights are divided into subcategories 1. Freedom of Expression and Belief 2. Associational and Organisation Rights 3. Rule of Law 4. Personal Autonomy Rule of law identified through four questions touching on: 1. Independent judiciary	1. Independent judiciary 2. Due process in civil and criminal matters 3. Protection from illegitimate use of force 4. Equal treatment of everyone	Expert opinions

		2. Due process in civil and criminal matters 3. Protection from illegitimate use of force 4. Equal treatment of everyone		
EU Justice Scoreboard	Annual comparative information tool. Its purpose is to assist the EU and Member States improve the effectiveness of their national justice systems by providing objective, reliable and comparable data on indicators relevant for the assessment.	Formal definition of the rule of law focusing on the justice system: the efficiency, independency and quality of the judicial system	Efficiency of Justice Quality of Justice Independence of the Judiciary	Hard data collected through various mechanisms, including from MS
Annual Rule of Law Reports EU Commission	The Rule of Law Report monitors significant developments, both positive and negative, relating to the rule of law in Member States. It covers four pillars: the justice system, the anti-corruption framework, media pluralism, and other	No clear definition.	1. Justice systems 2. Anti-corruption framework 3. Media Pluralism Institutional issues related to checks and balances	Draw from a variety of sources, combining soft and hard data. The data sources include: -EU Justice Scoreboard (objective data on matters relating to the efficiency, quality, and independence of justice systems in all MS) -Eurobarometer (on public opinion)

	institutional issues related to checks and balances.			- Committee for the efficiency of justice -Reports from international organisations (e.g., World Bank) -Contributions from MS and other stakeholders -Country visits -List of stakeholders involved

Annex II

Table I - Steps in the construction of composite indicators from Nardo et at. (2005)[376]

Theoretical framework - A theoretical framework should be developed to provide the basis for the selection and combination of single indicators into a meaningful composite indicator under a fitness-for-purpose principle.
Data selection - Indicators should be selected on the basis of their analytical soundness, measurability, country coverage, relevance to the phenomenon being measured and relationship to each other. The use of proxy variables should be considered when data are scarce.
Imputation of missing data - Consideration should be given to different approaches for imputing missing values. Extreme values should be examined as they can become unintended benchmarks.
Multivariate analysis - An exploratory analysis should investigate the overall structure of the indicators, assess the suitability of the data set and explain the methodological choices, e.g. weighting, aggregation.
Normalisation - Indicators should be normalised to render them comparable. Attention needs to be paid to extreme values as they may influence subsequent steps in the process of building a composite indicator. Skewed data should also be identified and accounted for.
Weighting and aggregation - Indicators should be aggregated and weighted according to the underlying theoretical framework. Correlation and compensability issues among indicators need to considered and either be corrected for or treated as features of the phenomenon that need to retained in the analysis.
Robustness and sensitivity - Analysis should be undertaken to assess the robustness of the composite indicator in terms of, e.g., the mechanism for including or excluding single indicators, the normalisation scheme, the imputation of missing data, the choice of weights and the aggregation method.
Back to the real data - Composite indicators should be transparent and fit to be decomposed into their underlying indicators or values.
Links to other variables - Attempts should be made to correlate the composite indicator with other published indicators, as well as to identify linkages through regressions.

[376] Michela Nardo, Michaela Saisana, Andrea Saltelli, Stefano Tarantola, Andres Hoffman and Enrico Giovannini, 'Handbook on constructing composite indicators: methodology and user guide' (2005) OECD Statistics Working Paper by, STD/DOC(2005).

Presentation and Visualisation - Composite indicators can be visualised or presented in a number of different ways, which can influence their interpretation.

Annex III

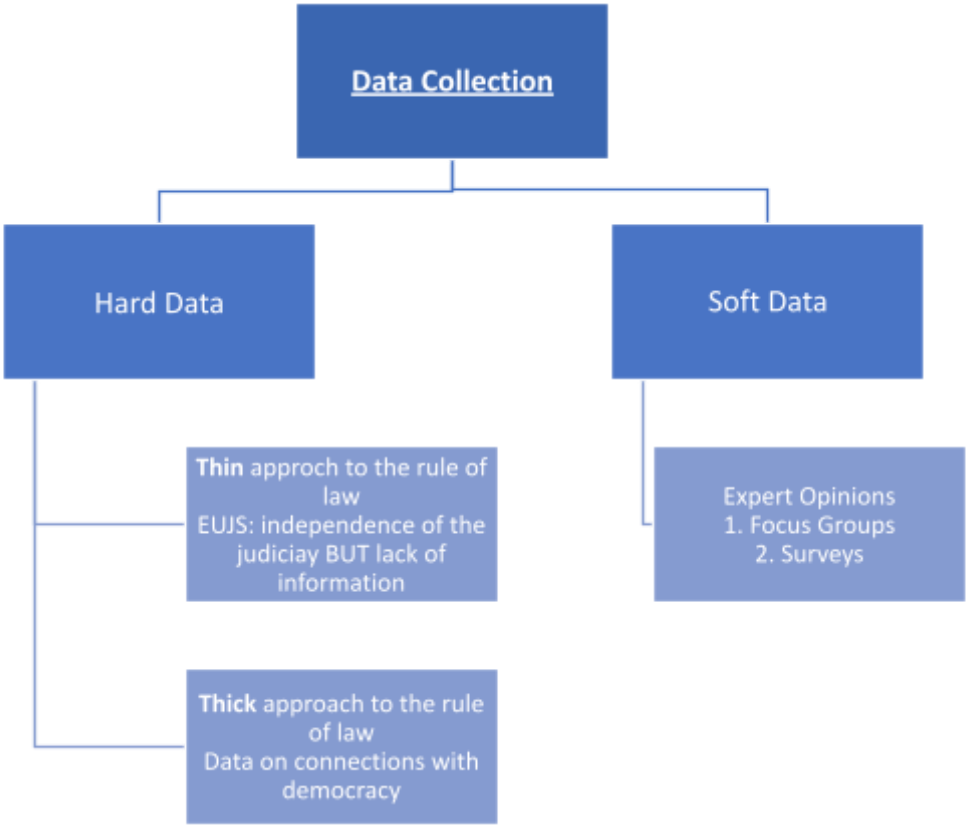

Table: Plan of Data Collection before any statistical analysis.